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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 278.

HOMER BIRD, PLAINTIFF IN ERROR,

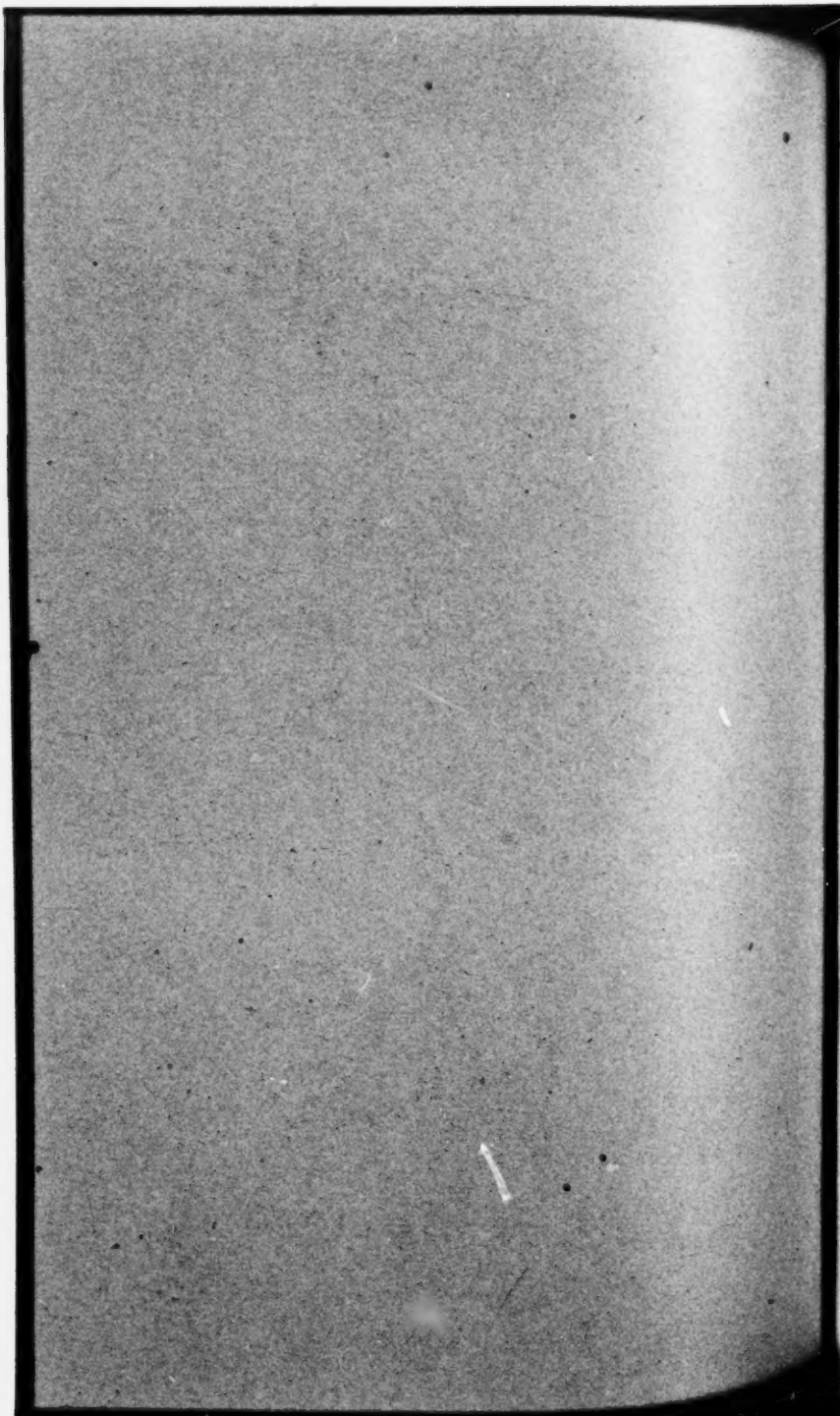
vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.

FILED MAY 19, 1900.

(17758.)



25972

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 278.

HOMER BIRD, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.

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1 UNITED STATES OF AMERICA, *District of Alaska, ss:*

Pleas and proceedings begun and holden at a regular term of the United States district court in and for the district of Alaska on the 7th day of November, A. D. 1899. Present, the honorable Charles S. Johnson, judge presiding; the honorable Robert A. Friedrich, U. S. district attorney for Alaska, and the honorable Albert D. Elliot, clerk.

On the 9th day of November, A. D. 1899, the United States grand jury, regulary selected, impanelled, sworn, and charged by the court, returned into open court the following indictment, to wit:

UNITED STATES OF AMERICA, *District of Alaska, ss:*

In the district court of the United States in and for the district aforesaid, at the adjourned Nov. term thereof, A. D. 1899, begun and held at Juneau, in said district, commencing on the 7th day of November, 1899.

The grand jurors of the United States, impaneled, sworn, and charged at the term aforesaid of the court aforesaid, on their oath present that Homer Bird, on the 27th day of September, in the year 1898, in the said district, and within the jurisdiction of said court, at or near a point on the Yukon River called Slaughter House Gulch, about two miles below Camp Dewey and about eighty-five miles above Anvik, committed the crime of murder—committed as follows: The said Homer Bird, at a point on the Yukon River, called Slaughter House Gulch, about two miles below Camp Dewey and about eighty-five miles above

2 Anvik, within the said district of Alaska, and within the jurisdiction of this court, on the 27th day of September, one thousand eight hundred and ninety-eight; said district had been before the said twenty-seventh day of September, in the year last-mentioned, ceded to the United States, and was on the last-mentioned day then and there under the rule and exclusive jurisdiction of the United States; did then and there purposely, and of his deliberate and premeditated malice aforethought, knowingly, willfully, unlawfully, and feloniously, in and upon the body of one J. H. Hurlin, a person in being, did make an assault with a certain double-barrelled shotgun, then and there charged with gunpowder and leaden bullets, which the said Homer Bird had and held in his hands, and the said Homer Bird did then and there purposely, knowingly, willfully, unlawfully, and of his deliberate and premeditated malice, discharge and shoot off to, against, and upon the said J. H. Hurlin, and that the said Homer Bird, with the bullets aforesaid, out of the shotgun aforesaid, then and there, by the force of the gunpowder aforesaid, by the said Homer Bird discharged and shot off as aforesaid, then and there feloniously, purposely, willfully, unlawfully, knowingly, and of his deliberate and premeditated malice, did strike, penetrate, and wound the said J. H. Hurlin in and upon the left side of the head and neck of him, the said J. H. Hurlin, giving to him, the said J. H. Hurlin, then and there, with the leaden bullets aforesaid, so as aforesaid discharged and shot out of the shotgun aforesaid, by the said

Homer Bird, in and upon the left side of the head and neck of him, the said J. H. Harlin, a mortal wound, of which said mortal wound, inflicted so as aforesaid, the said J. H. Hurlin did, on the said 27th day of September, 1898, die.

And so the grand jurors, duly selected, impaneled, sworn, and charged as aforesaid, upon their oaths do say that the said Homer Bird
3 him, the said J. H. Hurlin, did then and there and in the manner and form aforesaid, purposely, feloniously, unlawfully, willfully, knowingly, and of his deliberate and premeditated malice aforethought, kill and murder, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

ROBERT A. FRIEDRICH,
United States Attorney.

Endorsed:

No. 1327. District court United States, district of Alaska. The United States vs. Homer Bird, indictment (murder), a true bill. W. C. Pedlar, foreman. Filed Nov. 9th, A. D. 1899. Albert D. Elliot, clerk. Robert A. Friedrich, U. S. attorney. Witnesses examined before the grand jury in session: 1, Chas. Sheffler; 2, Wallace Blaine; 3, Naomi Strong; 4, Dr. Martin S. Burns; 5, Cornelious Vawter.

And afterwards, to wit, on Nov. 10th, 1899, the following further proceedings were had and entered of record, to wit:

UNITED STATES, PLAINTIFF, *vs.* HOMER BIRD, DEFENDANT. } No. 1327. Arraignment.

Now comes the plaintiff, by Robert A. Friedrich, U. S. attorney, and the defendant, appearing in person and by Malony & Cobb, his attorneys, was arraigned, and states that the above is his true name, whereupon copies of the indictment, a list of the witnesses to be called by the plaintiff upon the trial, and a list of the petit jury for this term were served upon defendant in open court by the U. S. attorney, and upon request defendant was given until 10 a. m. to-morrow to plead.

And afterwards, to wit, on Nov. 11th, 1899, the following order was made and entered of record, to wit:

UNITED STATES, PLAINTIFF, *vs.* HOMER BIRD, DEFENDANT. } No. 1327. Order extending time to plead.

4 Now comes the plaintiff, by Robert A. Friedrich, U. S. attorney, and the defendant being present in person and by his counsel, Messrs. Malony & Cobb, and upon request of counsel defendant was granted further time, until Monday, Nov. 13, 1899, at 10 o'clock a. m., in which to plead.

And afterwards the defendant filed his demurrer to the indictment herein, on the 13 day of November, 1899, in words and figures following, to wit:

In the United States district court for the district of Alaska.

THE UNITED STATES OF AMERICA }
vs. } Demurrer.
HOMER BIRD. }

The demurrer of Homer Bird to the bill of indictment returned against him herein.

Now comes Homer Bird, in his own proper person and by his counsel, into open court herein, and having heard the said indictment against him herein read, says that the same, and the matters and things therein contained in manner and form, as the same are therein stated and set forth, are not sufficient in law, and that he, the said Homer Bird, is not bound by the law of the land to answer the same, and this he is ready to verify. And the said Homer Bird assigns the following special causes for demurrer to the said indictment and to each count thereof, as follows, to wit:

I.

That said indictment does not substantially conform to the requirements of chapter 7 of title 2 of the act entitled "An act to define and punish crimes in the district of Alaska, and to provide a code of criminal procedure for said district," and that the crime attempted to be charged therein is not clearly and distinctly set forth in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended, and that said language is vague, uncertain, and indefinite.

II.

That the crime attempted to be stated and charged in said indictment is not stated with such a degree of certainty as to enable the court to pronounce judgment thereupon upon a conviction thereunder, according to the right of the case, or to enable the defendant to make his defense thereunder.

III.

The facts stated do not constitute a crime.

Wherefore, for want of a sufficient indictment in this behalf, the said Homer Bird prays judgment, and that he may be by the court dismissed and discharged in the premises in said indictment specified.

MALONY & COBB,
Attorney' for Defendant.

(Endorsed:) No. 1327. In the district court of the United States for the district of Alaska. United States, plaintiff, vs. Homer Bird, defendant. Demurrer. Original. Filed Nov. 13, 1899. Albert D. Elliot, clerk. Malony & Cobb, attorney' for defendant.

6 And afterwards, on Nov. 13th, 1899, the following order was made and entered of record, to wit:

UNITED STATES, PLAINTIFF, vs. HOMER BIRD, DEFENDANT. } No. 1327. Order overruling demurrer. Plea.

Now comes the plaintiff, by Robert A. Friedrich, U. S. attorney, and the defendant being present in person and by Messrs. Mahony & Cobb, his counsel, and the demurrer filed herein to the indictment coming on to be heard, and being submitted without argument, and the court being fully advised in the premises, overrules said demurrer, defendant duly excepting.

Whereupon defendant enters a plea of not guilty to the indictment, and the trial of this cause, upon the motion of the U. S. attorney, is set for Tuesday, November 14th, 1899, leave being granted for defendant's attorneys to present an application for the continuance of this cause until the next term of this court, at 10 o'clock a. m. to-morrow.

And afterwards, to wit, on November 15th, 1899, the defendant filed his motion for a continuance, which is as follows, to wit:

In the United States district court for the district of Alaska.

THE UNITED STATES vs. HOMER BIRD. }

7 Homer Bird, being duly sworn, upon his oath deposes and says: That he is the defendant in the above-entitled action; that affiant cannot safely go to trial of this cause at the present term of court on account of the absence of the witnesses James Hellem, Fred Resuch, James A. Aikene, Albert Toledonna, Mrs. Julia Cook, — Ong Hiller, A. Schwartz, and Mr. Keifer; that the said James Hellem resides at St. Michaels in the district of Alaska, and the other witnesses named reside at New Orleans, in the State of Louisiana. Affiant further shows that he expects to prove by the witness James Hellem that he was the officer who came to the Lower Yukon River for the purpose of making the arrest of the affiant for the crime with which he now stands herein charged, and the arrest and detention of the prosecuting witnesses, Naomi Strong and Chas. Sheffler, who were the only eye witnesses to the alleged murder with which affiant now stands charged; and after said witnesses were taken in charge by said James Hellem, as such officer, they stated to him that the deceased, Robert L. Patterson and J. H. Hurlin, who were both alleged to have been shot by the affiant at the same time, had immediately prior to said shooting engaged in a quarrel with affiant over the division of the supplies then owned in common by the said affiant and the said two parties, and which they then had on the Yukon River in the district of Alaska, and were in the act of making a deadly assault upon affiant at the time said shooting occurred; and *and* that just after said shooting affiant wished to go to St. Michael and surrender to the authorities, but was persuaded by said witness not to do so;

that said prosecuting witnesses herein beforementioned testified to an entirely different state of facts upon the examining trial of affiant herein, and affiant has reason to believe, and does believe, that from enmity to affiant they will testify to an entirely different state of facts upon the trial hereof; and the testimony of Hellem is material to the defense of affiant herein for the purpose of contradicting said witnesses for the Government, who were the only eye witnesses to the crime alleged against defendant in said indictment.

Affiant expects to prove by the witness' Fred Resuch, James A. Aikens, Albert Toledonna, Mrs. Julia Cook, — Ong Hiller, A. Schwartz, and Mr. Keifer, that they have known affiant for many years prior to the date of the crime alleged against him herein, and that he has always been a man of good character, and peaceable and law-abiding.

Affiant further shows that the indictment herein against him was returned on the 9th day of November, 1899, and that since said time he has had no time or opportunity to procure the attendance of said witnesses or their testimony, and will not have an opportunity to procure said testimony during the present term of court because of the inaccessibility of said witnesses to said court.

Affiant further shows that he was arrested upon the charge against him herein, on the 8th day of April, 1899, and has ever since been kept in close confinement and unable for lack means and opportunity to prepare his defense herein and procure material testimony to his defense from the said witnesses, and that he knows of no other witnesses from whom he can obtain such testimony, except that there other persons in New Orleans, in the State of Louisiana, by whom he can prove his previous good character; but all said persons are equally as inaccessible, and their testimony is as impossible to be procured as those whose testimony he desires time to procure. Affiant further shows that he is a citizen of the city of New Orleans, in the State of Louisiana, and came to the district of Alaska, in year 1898, on a prospecting expedition, and has no acquaintances in the district of Alaska, by reason of being a stranger here, by whom he can prove his previous good character.

Affiant further shows that he can not safely go to trial at this time for the following reasons, to wit, that he has no means in the district of Alaska by which to procure the services of counsel for his defense herein; that he has ample means in the city of New Orleans, in the State of Louisiana, whereby he expects, before the convening of the next term of this court, to be able to procure the services of his chosen counsel, to wit, N. O. Roberts, who resides at New Orleans, in the State of Louisiana, to defend him in this cause; that Messrs. Malony & Cobb are only temporarily representing affiant herein until this motion is disposed of, and if the same is not granted affiant will be left without the services of counsel for his defense under the charge for which he herein stands indicted; that at the time of his arrest he was up on the Yukon River, in the district of Alaska, and without any mail facilities whereby he could communicate with his friends and agents in the city of New Orleans, State of Louisiana, and was kept confined in the far western part of the district of Alaska, to wit, at St. Michaels, until about the 23rd day of Oct., 1899, when he was brought to Sitka, and has since been in confinement at that

place until brought to Juneau at the convening of the present term of court, and has thereby been denied any opportunity to procure means to employ counsel and make his defenses herein. Affiant verily believes and expects to be able by the convening of next term of this court to procure the testimony of said witnesses and the services of said
10 counsel to defend him herein, and that this cause can not be tried with justice to himself without the testimony of such witnesses and the services of counsel, properly retained in his behalf, as he expects to be able and will do on or before the next term of this court. Affiant further says this motion for continuance is not made for delay, but in good faith for the purpose of obtaining a fair and impartial trial, and that justice may be done. A. H. Bird. Subscribed and sworn to before me this 15th day of Nov., 1899. J. H. Cobb, notary public [seal] for Alaska. (Endorsed:) No. 1327. In the district court of the United States for the district of Alaska, The United States, plaintiff, vs. Homer Bird, defendant. Affidavit. Filed Nov. 15th, 1899. Albert D. Elliot, clerk. Malony & Cobb, attorneys for defendant. Office, Juneau, Alaska.

And afterwards, to wit, on November 17th, 1899, the following order was made and entered of record, to wit:

UNITED STATES, PLAINTIFF, *vs.* HOMER BIRD, DEFENDANT. } No. 1327. Order denying motion.

Now comes the plaintiff, by Robert A. Friedrich, U. S. attorney, and the defendant being present in person, and by Malony & Cobb, his counsel, and the motion for a continuance on file herein coming on to be heard and being argued by the respective counsel, and the court being fully advised in the premises, denies said motion, to which said ruling counsel for defendant duly except.

11 And afterwards, on November 28, 1899, the following motion was filed in said cause, and is in words and figures following, to wit:

In the United States district court in and for the district of Alaska.

THE UNITED STATES *vs.* HOMER BIRD. }

Comes now the defendant in the above-entitled action, by his attorneys, Malony & Cobb, and moves the court herein for an order directed to the United States marshal, commanding him to permit and allow the said Malony & Cobb to see and converse with one Naomi Strong, now held in the custody of the said United States marshal in the jail at Juneau, Alaska, and subpœnaed as a witness on behalf of said defendant. This motion is based upon the affidavit hereto attached and made a part hereof.

MALONY & COBB.

12 UNITED STATES, *District of Alaska, ss:*

John F. Malony, being duly sworn, deposes and says: I am one of the attorneys for Homer Bird, the defendant in the case of the

United States against Homer Bird, charged with murder. That I caused to be issued a subpœna out of the United States district court for the district of Alaska, directed to one Naomi Strong, a witness on behalf of the Government and now held in the custody of the United States marshal in the jail at Juneau, Alaska.

That I made a demand in writing upon said marshal for the privilege to see and converse with said Naomi Strong, the witness aforesaid, a witness material and necessary for defense of defendant, and that permission was refused by said marshal for the reason set forth in the written demand hereto attached. Affiant therefore asks an order of this court, directed to said marshal, commanding him to permit and allow the attorneys for said Homer Bird to see and converse with the witness, Naomi Strong, prior to the trial of said cause, which occurs on the 1st day of December, 1899.

JOHN F. MALONY.

Subscribed and sworn to before me this 28th day of November, 1899.

[SEAL.] M. GRINNELL,
Notary Public.

13 JUNEAU, ALASKA, *November 28th, 1899.*

To JAMES M. SHOUP, Esq.,
U. S. Marshal for the district of Alaska.

We, John F. Malony and John H. Cobb, attorneys for Homer Bird, in the case of the United States against Homer Bird, on the charge of murder, hereby demand permission and the privilege to seeing and conversing with Naomi Strong, a witness on behalf of the Government in the above-entitled cause, and now detained by you in the jail at Juneau, Alaska.

You will further take notice that a subpœna has been duly issued out of the United States district court for the district of Alaska, directed to the said Naomi Strong, commanding her to appear as a witness on behalf of the defendant in the above-entitled court on December 1st, 1899.

JOHN F. MALONY.
JOHN H. COBB.

Due service of a copy of the within demand admitted this 28th day of November, 1899.

14 JAMES M. SHOUP.
U. S. Marshal.

DEPARTMENT OF JUSTICE,
UNITED STATES MARSHAL'S OFFICE,
DISTRICT OF ALASKA,
Juneau, Alaska, 28 November, 1899.

JOHN F. MALONY, Esq.,
Attorney at Law, Juneau, Alaska.

SIR: I am in receipt of your communication of this day requesting the privilege of seeing and conversing with Naomi Strong, a witness on behalf of the Government in the case of the United States vs. Homer Bird. In reply I have to say that, in my opinion, a detained witness is subject to the prison rules the same as any other prisoner, and the only statute which I can find making it compulsory to permit attorneys to see

and interview prisoners is section 1034 of the U. S. Revised Statutes, which provides that attorneys for the defendant shall be allowed to see their client at all reasonable hours.

It therefore appears to me that it is entirely discretionery with the marshal whether persons other than attorneys for defendants can see and converse with prisoners in his custody, and I know of no reason why the attorney for the defendant should have access to witnesses for the Government when held at the expense of the Government.

Your request is denied.

Very respectfully, JAMES M. SHOUP,
U. S. Marshal.

(Endorsed:) No. 1327. In the United States district court for the district of Alaska. United States, plaintiff, vs. Homer Bird, defendant. Motion. Filed Nov. 28, 1899. Albert D. Elliot, clerk. Malony & Cobb, attorney' for defendant.

15 And afterwards, on November 28, 1899, the following order was made and entered of record, to wit:

In the United States district court for the district of Alaska.

THE UNITED STATES)
vs.)
HOMER BIRD.)

Upon filing and reading the motion of Messrs. Malony & Cobb and the affidavit of J. F. Malony and the papers thereto attached, asking for permission to see and converse with one Naomi Strong, a witness detained by the Government and subpœnaed by the defendant.

It is ordered that the United States marshal for the district of Alaska, in whose custody the said Naomi Strong now is, permit the said Malony & Cobb, in the presence of the said marshal, to see and converse with the said Naomi Strong at such suitable hour before trial as the marshal shall designate.

Dated November 28th, 1899.

CHARLES S. JOHNSON, *Judge.*

(Endorsed:) No. 1327. United States vs. Homer Bird. Order. Filed Nov. 28, 1899. Albert D. Elliot, clerk.

And afterwards, to wit, on December 1st, 1899, the further following proceedings were had and entered of record, to wit:

16 UNITED STATES, PLAINTIFF,)
vs.) No. 1327.
HOMER BIRD, DEFENDANT.)

Now comes the plaintiff, by Robert A. Friedr'ch, U. S. attorney, and the defendant being present in person and being represented by Messrs. Malony & Cobb, his counsel, F. D. Kelsey, esq., was appointed and sworn reporter to take the testimony; Charles Yule and J. W. Haynes were sworn bailiffs, and this cause coming on for trial, the clerk proceeded to call the venire of the petit jury under the direction of the court,

and the regular panel of the petit jury being exhausted because of the challenges exercised by the parties, the court made the following order, to wit:

It appearing to the court that there is not present a petit jury sufficient to complete the jury in this cause, the United States marshal or his deputy is hereby ordered and directed to summon from the bystanders a sufficient number of citizens of the Territory and of the United States having the qualifications of jurors to complete the jury.

In pursuance of the foregoing order the United States marshal summoned and returned the following-named persons, to wit: H. W. Price, J. W. Price, John Reck, E. D. Rasmussen.

The jury in this cause being completed, the jurors were sworn as to their qualifications, and being passed for cause, the following-named jurors were sworn to try the issues, viz: Peter Hahn, Frank Forrest, Harry Wilde, G. L. Grant, William Geddes, M. L. Tatom, L. A. Moore, N. King, H. W. Price, J. W. Price, John Reck, E. D. Rasmussen.

By request of counsel it is ordered by the court that all witnesses except the U. S. marshal, J. M. Shoup, and Deputy U. S. Marshal C. L. Vawter be excluded from the court room until called to testify.

The indictment was read to the jury by Assistant U. S. Attorney
17 A. J. Daly. The opening statement was made by the U. S. attorney to the jury and waived by attorneys for defendant, and there not being sufficient time to take the testimony, the jury was duly cautioned, and it is ordered by the court that this cause be continued until 10 a. m. to-morrow.

And afterwards, on December 2, 1899, the defendant filed his motion in this cause, which is in words and figures following, to wit:

In the United States district court in and for the district of Alaska.

THE UNITED STATES)
vs.)
HOMER BIRD.)

Now comes the defendant by one of his counsel, J. F. Malony, and moves the court to grant him an order directing the marshal of this district to make a full and complete search among the personal effects of the witness Naomi Strong, now in the custody of the United States marshal, and to procure from among said effects a certificate of marriage dated the day of October, 1893, between the defendant, under the name of W. Evans, and the said Naomi Strong, then Mabel Pitman; that said marriage certificate is competent and necessary to the defense of the defendant herein, and is, as defendant verily believes, among said personal effects and can be obtained by the marshal if such order is granted, and can not be obtained in any other manner; that affiant does verily believe that unless said order is granted defendant will be wholly unable to obtain such evidence, for that said witness will refuse to produce the same and will deny its existence, and if opportunity is afforded her will destroy said marriage certificate rather than allow the same to be produced on this trial.

I, J. F. Malony, being first duly sworn on oath, say I am one of the attorneys for the defendant in the above-entitled cause, and
18 the facts set out in the above and foregoing motion are true, as I verily believe.

J. F. MALONY.

Subscribed and sworn to before me this 2 day of December, 1899.

[SEAL.] ALBERT D. ELLIOT, *Clerk.*

(Endorsed:) No. 1327. In the district court of the United States for the district of Alaska. United States, plaintiff, vs. Homer Bird, defendant. Motion. Filed Dec. 2, 1899. Albert D. Elliot, clerk. Malony & Cobb and T. R. Lyons, attorney' for defendant.

19 And afterwards, on December 2nd, 1899, the following further proceedings were had in said cause, to wit:

UNITED STATES, PLAINTIFF,
vs. No. 1327. Trial.
HOMER BIRD, DEFENDANT.

Now at this day come again the parties hereto, the plaintiff being represented by Robert A. Friedrich, U. S. attorney, the defendant being personally present and represented by Messrs. Malony & Cobb, his counsel; also come the jury heretofore impaneled and sworn herein, and being called by the clerk and all answering their names, the trial of this cause proceeded.

Charles Sheffler and Naomi Strong were sworn to testify on *on* the part of the plaintiff, and thereupon counsel for defendant file their motion in this cause, praying the court to direct the marshal of this district to make a full and complete search among the personal effects of the witness Naomi Strong to procure a certificate of marriage of said witness with the defendant, and being argued by the respective counsel, and the court being fully advised in the premises, denies said motion, counsel for defendant duly excepting, and there not being sufficient time to conclude the testimony, it is ordered by court that this cause be continued until Monday, December 4, 1899, at 9 o'clock a. m.

20 And afterwards, on December 4, 1899, the following further proceedings were had, to wit:

UNITED STATES, PLFF.,
vs. No. 1327.
HOMER BIRD, DEFT.

Now, on this day come again the parties hereto, the plaintiff being represented by Robert A. Friedrich, U. S. attorney, the defendant being personally present and represented by Messrs. Malony & Cobb, his counsel; also come the jury heretofore empaneled and sworn herein, and being called by the clerk and all answering to their names, the trial of this cause proceeded.

Naomi Strong continued to testify on behalf of plaintiff. Wallace W. Blaine and C. L. Vawter were sworn to testify on the part of plaintiff, whereupon plaintiff rests.

Charles Sheffler was recalled for further cross-examination by defendant; Dr. Demorette and Kate Van Horn were sworn to testify on behalf of defendant, and, there not being sufficient time to conclude the testimony, it is ordered by the court that this cause be continued until to-morrow at 10 o'clock a. m.

And afterwards, on December 5, 1899, the following further proceedings were had, to wit:

UNITED STATES, PLFF., }
vs. } No. 1327.
HOMER BIRD, DEFT. }

Now, on this day come again the parties hereto, the plaintiff being represented by Robert A. Friedrich, U. S. attorney, and the defendant being personally present and represented by Messrs. Malony & Cobb, his counsel; also come the jury heretofore empaneled and sworn herein, and being called by the clerk and all answering to their *their* names, the trial of this cause proceeded.

21 Homer Bird, the defendant, was sworn to testify on his own behalf, whereupon defendant rests.

Naomi Strong, Wallace W. Blaine, and Charles Sheffler were called on rebuttal by plaintiff.

The evidence being heard, the cause was argued by counsel, the plaintiff being represented by Robert A. Friedrich, esq., U. S. attorney, and the defendant being represented by Messrs. Malony & Cobb.

Thereupon the jury were instructed by the court and retired for *for* deliberation in charge of their sworn bailiffs.

22 The court read to the jury the following instructions, to wit:

In the United States district court in and for the district of Alaska.

THE UNITED STATES }
vs. }
HOMER BIRD. }

ASKED BY DEFENDANT.

First.

Gentlemen of the jury, you are instructed that an accomplice in law means anyone who participates in an offense, whether as principal or accessory; and you are further instructed that an accessory is one who is guilty of an offense, not by committing the offense in person or as principal, but by being in some way guiltily concerned therein, as by advising or inciting another to commit a crime, or by concealing the principal offender, or by concealing or aiding the guilty party, after having knowledge of his guilt, or helping him to escape punishment. And you are further instructed that you can not convict upon the uncorroborated testimony of an accomplice; and if you find and believe from the evidence that the witnesses Sheffler and Naomi Strong were accomplices in the

killing of the deceased Hurlin by the defendant, yet if you find there is no other evidence connecting the defendant with the commission of the crime except the testimony of such accomplices, or unless the testimony of such accomplices as to the main and material facts constituting the crime are corroborated by other ev'dence, you can not find the defendant guilty; but such corroborating evidence must be something more than the mere showing that the crime had been committed, and must tend directly to connect the defendant with the act itself, and with each and all the elements that enter into the commission of the crime
23 charged, and unless the testimony of such accomplices is so corroborated, you will acquit.

Second.

You are instructed that the testimony of one accomplice does not corroborate the testimony of another accomplice, and if you find and believe from the evidence that the witnesses for the Government, Charles Sheffler and Naomi Strong, were both accomplices in the killing of J. H. Hurlin, the deceased, and that their testimony tending to prove the defendant guilty of the crime charged in the indictment is not corroborated by any other evidence except their own tending to connect the defendant with such killing, then you will find the defendant not guilty.

Third.

You are instructed that a conviction in this case can not be had upon the testimony of an accomplice, unless such testimony be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and the corroboration is not sufficient if it merely shows the commission of the crime and the circumstances of the commission, but such corroboration must go to the extent of corroborating the testimony of the accomplice upon each and every one of the material allegations in the indictment which are necessary to constitute the offense charged; and if you find and believe from the evidence that the witness, Charles Sheffler and Naomi Strong were accomplices in the killing of J. H. Hurlin, if you find he was killed, and that their testimony tending to connect the defendant with such killing is not corroborated by other competent evidence, you must acquit, and this corroboration must be not only to the fact of the killing of deceased, but to the guilty intent and to all facts and circumstances which would make such killing a crime under the instructions given you by the court.

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Fourth.

Gentlemen of the jury, you are instructed that the law in this distric recognizes the right of self-defense; and if you find and believe from the evidence that the defendant Homer Bird shot and killed the deceased,

J. H. Hurlin, and you further find that at the time of such killing the said J. H. Hurlin was in the act of securing a weapon under such circumstances as to cause a reasonably prudent man to believe, and the defendant did believe, that the purpose of procuring such a weapon was to shoot and kill the defendant, then the defendant had a right to protect himself, even to the extent of killing the said deceased; and in judging whether or not the defendant was justified in shooting the deceased, if you find that he did shoot and kill him, you are to take into consideration all the circumstances surrounding the parties at the time, and judge of the acts of the defendant from his standpoint; and in viewing it from his standpoint you must also consider all the facts and circumstances preceding and leading up to the fatal difficulty, including any information given to the said defendant, if you find any information was given him, as to threats made against him by the deceased, and if, in view of all the circumstances, the defendant had reasonable ground to believe, and did believe, that it was necessary to shoot the said J. H. Hurlin in order to save his life and to protect himself from a great bodily harm and threatened injury at the hands of the said J. H. Hurlin, then you will acquit.

25

Fifth.

Gentlemen of the jury: In judging of the defendant's right of self-defense you must take into consideration the situation in which the defendant was placed, the circumstances surrounding him, his individual character, the apparent or reasonable danger which threatened him, and if, in view of all these circumstances, you find and believe that the defendant honestly believed that it was necessary, in order to protect his own life or to save himself from great bodily harm, to shoot and kill the deceased, then you will find him not guilty.

Sixth.

Gentlemen of the jury: If you find and believe from the evidence that the defendant had reason to believe, and did actually believe, that the deceased, J. H. Hurlin, and one Robert Patterson were plotting to assassinate him, and at the time of such information came to him, and up to the time of the death of deceased, the defendant had no opportunity to appeal to the law for protection and was compelled to rely upon his own individual resources to protect himself against such expected assassination, and if at the time of the killing he further believed and had reason to believe that deceased was about to attempt such assassination pursuant to a previous understanding and plotting between the said Hurlin and Patterson, then he had a right to act upon such belief and to take such steps as in view of all the surrounding circumstances as appeared to him reasonably necessary to protect himself and to save himself from such threatened attack; and if you find that the defendant shot and killed the said J. H. Hurlin believing, and having a right to believe from his standpoint, in view of all the surrounding circumstances, that such shooting was necessary, then you will acquit.

In judging of the reasonableness or unreasonableness of the defendant's conduct and belief you must take into consideration the remote-
26 ness of the parties from civilization and all legal protection against any threatened injury, and not judge him as you would a

person who would commit a similar act in a settled community, or where a person would not be thrown so entirely upon his own resources for his protection.

Seventh.

The jury are instructed that the law presumes the defendant innocent in this case, and not guilty as charged in the indictment, and the presumption should continue and prevail in the minds of the jury until they are satisfied by the evidence, beyond all reasonable doubt, of the guilt of the defendant, and acting upon this presumption the jury should acquit the defendant, unless you are constrained to find him guilty by the evidence of witnesses of such guilt beyond a reasonable doubt. And this presumption of innocence is not a mere fiction, but a substantial right upon which you, upon your oaths as jurors, must act and be guided by and continues with the defend'nt and guards him against a conviction until you are satisfied by the evidence, beyond a reasonable doubt, that he is guilty of the crime charged. And the court further instruct you that this presumption of innocence goes to every material fact charged in the indictment and necessary to be proved in order to constitute the crime charged.

Eighth.

You are instructed that in this case if a reasonable doubt of any fact necessary to convict the accused is raised in the minds of the jury by the evidence or by any hypothesis reasonably consistent with the evidence, that doubt is decisive in favor of the prisoner's acquittal.

Ninth.

A verdict of not guilty means no more than this, that the guilt of the defendant has not been demonstrated in the precise, specific, and
27 narrow forms prescribed by the law. The evidence to convict the defendant must not merely be beyond all reasonable doubt consistent with the hypothesis of his guilt, but it must also be beyond all reasonable doubt inconsistent with any hypothesis of innocence that can reasonably be dr'wn from the evidence, for under the law no jury should convict a citizen of crime upon mere suspicion, however strong, or simply because there is a preponderance of all the evidence in the case against him, and simply because there is a strong reason to believe that he is guilty; but before the jury can lawfully convict they must be convinced of the defendant's guilt beyond all reasonable doubt. And if in this case you have a reasonable doubt and are not satisfied beyond such reasonable doubt that the Government has made out its case by competent and credible evidence, such as to produce a moral certainty in your minds of the truth of his guilt, then you should acquit.

You are further instructed in this case that the law does not require the defendant to prove himself innocent, but the law imposes upon the Government the burden of proving that the defendant is guilty in manner and form, as charged in the indictment, to the satisfaction of the jury, beyond all reasonable doubt, and unless they have done so, the jury should find him not guilty.

The jury are further instructed that the indictment in this case is of itself a mere accusation or charge against the defendant, and affords not the slightest evidence of the defendant's guilt, and no juror in this case should permit himself to be in any manner or to the slightest extent influenced against the defendant because or on account of the indictment against him.

28 You are instructed that the burden is upon the Government in this case to establish by creditable evidence every material allegation in the indictment, to the satisfaction of the jury, beyond a reasonable doubt, and if you find and believe that the witnesses for the Government, testifying to any one or more of the material allegations charged in the indictment, are not creditable witnesses, and because you are satisfied and believe that they are not creditable witnesses you have a reasonable doubt of the guilt of the defendant, then you are instructed to acquit.

The court instructs you that a reasonable doubt is that state of mind which, after a full comprehension and consideration of all the evidence, both for the Government and for the defense and the consideration of the witnesses, their character or interest they have in the result of this trial, their animosity towards the accused, or friendship toward him, and all other circumstances that might influence them, leaves the mind of the jury in that condition that they can not say that they feel an abiding faith amounting to moral certainty from the evidence in the case that the defendant is guilty of the crime laid in the indictment, and if you have such doubt, and your conviction of the defendant's guilt as laid in the indictment does not amount to a moral certainty, from the evidence in the case, of his guilt, then the court instructs you that you must acquit him.

29 The rules as to the amount of evidence required in a civil case and in a criminal prosecution are entirely different, for in a criminal case—and the case you are now trying is a criminal case—a mere preponderance of evidence would not warrant the jury in finding the defendant guilty, but before you can convict the defendant you must be satisfied of his guilt beyond all reasonable doubt, and unless so satisfied you must acquit him; and even if the evidence is so strong that it demonstrates to you the probability of the defendant's guilt, still if it fails to establish, beyond a reasonable doubt, that he is guilty of the crime laid in the indictment, then it is your duty to acquit him.

You are instructed that the jury are the sole judges of *of* the facts in this case, and the credit to be given to the respective witnesses who have testified, and in passing upon the creditability of such witnesses you have a right to take into consideration their prejudices, motives, or feelings of revenge, or any other motives which would induce them to desire the conviction or acquittal of the defendant, if any such prejudices, motives, or feelings of revenge appear to exist; and if you believe from the evidence that any witness or witnesses have knowingly or willingly testified falsely to any material fact or point in this case, you are at liberty, unless their testimony is corroborated by other creditable evidence, to disregard the testimony of such witness or witnesses in toto.

If you find and believe from the 'vidence in this case that any one or

more of the witnesses for the Government are persons of base and immoral character, you should consider such fact or circumstances
30 connected with their character and the life you may find from the evidence that they lead, and if upon such consideration you have not an abiding faith, beyond all reasonable doubt, that such person's testimony is true, and if you find that the crime laid in the indictment is not established beyond a reasonable doubt, except by the testimony of such witnesses, then you should acquit; that is, to say, if you find it necessary to believe that such witnesses, if you find any such have testified in this case on behalf of the Government in order to establish the guilt of the defendant by the evidence, and *and* you have a reasonable doubt as to the truth of the testimony of such witness, then you must acquit.

The theory of the prosecution in this case, in order to establish the guilt of the defendant, is that the defendant shot and killed the deceased, J. H. Hurlin, from a distance of about 6 or 7 feet, with a shotgun loaded with shot known as BB or buckshot, and that such shot took effect in the head of the deceased, and there is no evidence of the commission of the crime charged in any other manner, and if you find and believe, from all the circumstances and evidence before you, or if you have a reasonable doubt from all such circumstances and evidence that the crime charged in the indictment was not perpetrated in the manner aforesaid, then you must acquit.

The jury are instructed that the defendant is not on trial for the shooting of one R. K. Patterson, and you are not to consider any of the evidence tending to show that the defendant did shoot R. L. Patterson for the purpose of establishing the guilt of the defendant as to the commission of the crime charged in the indictment, nor are you to allow any such evidence to influence you in making up your verdict as to whether or not the defendant is guilty in this case, such evidence
31 as to the shooting of R. L. Patterson being only admissible as part of the res gestæ.

You are instructed that when a verbal admission of a person charged with crime is offered in evidence, the whole of the admission must be taken together, both that which makes for the accused as well as that which makes against him, and if a part of the statement which is in favor of the defendant is not disproved and is not apparently improbable or untrue, when considered by all the other evidence in the case, then such part of the statement which is in favor of the defendant is entitled to as much consideration as any other part of the statement which may be against him.

In this case it would be highly improper and wrong for you to regard any statement of the prosecuting attorneys that are not based upon the evidence in the case, if any such have been made, and if you find they have been made you should not give them any weight whatever in this case.

Gentlemen of the jury, you are instructed that it is the duty of a party to a cause to produce all the evidence bearing upon the issues to be tried that is material and reasonably attainable, so as to throw all the light possible upon the questions to be determined, and a failure to produce all such evidence raises a presumption against the party so failing,

and if you find and believe, from the evidence in this case, that there are material witnesses which the Government could reasonably have produced on this trial, and whose testimony would have thrown additional light upon the circumstances of the killing of J. H. Hurlin, and the Government has failed to produce such witnesses, then you may take into consideration these circumstances, in connection with all the other evidence in the case, in determining whether or not the prosecution has made out a case showing the guilt of the defendant beyond all
32 reasonable doubt; and if this circumstance—that is, to say, the failure of the Government to produce all the evidence that it could reasonably have produced—if you find there has been such failure, taken in connection with all the other evidence in the case, raises in your mind a reasonable doubt of the guilt of the defendant, then you will acquit.

In this case the defendant had a right to testify in his own behalf, and has so testified, and you have no right to disregard his testimony on the ground alone that he is the defendant and stands charged with the commission of a crime. The law presumes the defendant to be innocent until he is proved guilty, and you should fairly and impartially consider his testimony, together with all the other evidence in the case, and if, upon such consideration, taking into account his interest in the trial, together with the motives, if any, influencing the *the* testimony of the other witnesses, you believe him innocent or have a reasonable doubt of his guilt, you should acquit.

(Endorsed:) No. 1327. U. S. vs. Homer Bird. Instructions, filed Dec. 5, 1899. Albert D. Elliot, clerk.

ASKED BY THE PLAINTIFF.

I.

The court instructs the jury that if they believe from the evidence, beyond a reasonable doubt, that the defendant, Homer Bird, on the 27th day of Sept., 1898, at a point on the Yukon River, about two miles below the coal mine known as Camp Dewey, and about eighty-five miles above Anvik, and within the district of Alaska, shot and killed one J. H. Hurlin and that said killing was malicious, premeditated, and willful, and that said killing was not in the necessary defense of the defendant's life or to prevent the infliction upon him of great bodily harm, then it is your duty to find the defendant guilty as charged in the indictment.

33 II.

That before any person is permitted to take the life of another he must have exhausted all other means of escape consistent with safety against the taking of his own life or the infliction upon him by the deceased of great bodily harm.

III.

That, as in this case, where it is claimed by the defendant that up to the time of the killing of the deceased there had been no previous quarrel or difficulty, but that the relations had been friendly and amicable, but that in the discussion between defendant, deceased, and one Patterson of a business matter a quarrel suddenly sprung up between Patterson and defendant, and defendant struck Patterson in the face after first having been hit by Patterson in the side; that thereupon Patterson started to run away and deceased started in another direction; that neither Patterson nor deceased were armed, and that defendant seized a shotgun and killed the deceased, and that at the time of so doing defendant's life was not in imminent danger or his person in danger of great bodily harm, and that he had no good reason to believe that such was the case, then the defendant is guilty of murder.

IV.

That the law presumes that everyone intends the natural results and consequences of his acts and that malice and intent may be inferred by the jury from the action and manner of the defendant, the kind of weapon used, and from all the circumstances of the case.

V.

That the jurors are the sole and exclusive judges of the testimony, its weight, value, and of the credibility of witnesses, and if they
34 believe that any witness has willfully testified falsely to any material fact in the case they have the right to disregard the entire testimony of such witness unless corroborated by other credible testimony. That in making up their minds as to what credit or weight should be given to any witness it is their duty to take into consideration the conduct of such witness upon the witness stand, his manner of giving testimony, his interest in the result of the trial, if any, and the reasonable probability, considered in connection with all the testimony given, of such witnesses' testimony being true or false.

VI.

That murder is the unlawful killing by a person of sound mind and decretion of any reasonable creature in being, with malice aforethought, either express or implied. That while malice is an offensive element in the crime of murder, yet there is no necessity of any ill will, spite, or hatred toward the deceased personally in order that malice may be implied, but the term may be defined as that condition of mind which shows the heart, regardless of duty, and fatally bent on mischief toward another person. Express malice is where one with deliberate mind and formed design kills another.

VII.

I charge you that proof of escape or attempt to escape is proper, in a case like the one at bar, for the jury to consider, and while such proof of

escape in a criminal case of itself is by no means strong enough to warrant a conviction, yet it may become one of a series of circumstances from which guilt may be inferred.

(Endorsed:) No. 1327. United States vs. Homer Bird. Instructions filed Dec. 5th, 1899. Albert D. Elliot, clerk.

35 In the United States district court for the district of Alaska.

UNITED STATES OF AMERICA } Court's charge to jury.
vs.
HOMER BIRD. }

Gentlemen of the jury: During the present term of court most of you have been called upon to assume responsibilites and discharge obligations highly grave and *honorous*. That these responsibilities have been cheerfully assumed and these obligations honestly and faithfully discharged is a source of gratification to the law-abiding citizens of the Territory. You are now to be congratu*l*ted that you are about to complete your labors in the last of the class of cases above referred to.

It is indeed a high and responsible public duty that you are chosen to perform. Sitting here, as you are, in judgement upon the life or liberty of a fellow-being, the responsibility for the faithful and impartial administration and enforcement of the criminal law rests upon you. In your capacity as jurors you represent the United States, and in a forum like this, with twelve good and true jurors in the box, the life or liberty of the individual as well as the property and safety of society is protected.

We all recognize the necessity of laws and the equal necessity of their just and impartial enforcement, for the enforcement of the law is the safeguard of all we hold most dear; without just and efficient enforcement the law affords no protection; it is only by the punishment of the guilty that society is protected, thereby affording protection to the innocent.

When an innocent man is convicted of crime not only is great
36 injustice done him, but the law is outraged and society injured.

And it is equally true that when a guilty man is acquitted and escapes punishment the law so far fails of its object, life and property is so much less secure, and public confidence in the sufficiency of the law as a protector is impaired. The defendant in this case is charged with the highest crime known to law—murder. He is charged with having premeditatedly and maliciously shot and killed one J. H. Hurlin, within the district of Alaska and within the jurisdiction of this court. The weapon charged to have been used is a loaded shot gun, and the mortal wound inflicted is charged to have been upon the head and neck of the deceased.

The law under which this prosecution is brought is found in the Revised Statutes of the United States, and not under the criminal code prepared for the district of Alaska. The reason for this, gentlemen, is that the latter code did not become a law of this district until the first day of last July, and that code specifically provide' that nothing therein shall in any manner affect the proceedings or trial of a person charged with the commission of crime prior to that date. The defendant is

charged by the indictment with having committed the crime for which he is now being tried on the twenty-seventh day of September, 1898. We are therefore compelled to have to resort to the law governing the crime of murder in force in this district prior to July first, 1899.

Under the law governing this case there are no degrees of murder and the crime is not defined. We are compelled to resort to the common law for a definition of the crime of murder.

Under the common law murder is us'ally defined as follows: When a person of sound memory unlawfully and feloniously kills a human being under the peace of the United States with malice aforethought, either express or implied, such slayer is guilty of murder.

37 The chief characteristic of the crime of murder is malice prepense or aforethought. And it is indispensible that this malice be proved. The term malice aforethought, however, is not restricted to spite or malevolence towards the deceased in particular, but it is understood to mean that general malignity and recklessness of the lives and personal safety of others which proceeds from a heart void of a just sense of social duty and fatally bent on mischief. And whenever the fatal act is committed deliberately and without adequate provocation, the law presumes it was done with malice.

Malice is either express or implied. Express malice exists when the party evinces an intention to commit the crime. It is proved by evidence of a deliberately formed design to kill another; and such design may be shown from the circumstances attending the act, such as the deliberate selection and use of a deadly weapon, knowing it to be such. And I instruct you as a proposition of law that a shotgun loaded with powder and leaden bullets, in the hands of one capable of using it, and within striking distance is a deadly weapon.

Implied malice is an inference or conclusion of law upon the facts found by the jury. When a man commits an act unaccompanied by any circumstances justifying its commission, the law presumes he has acted advisedly and with an intent to produce the consequences which have ensued. And therefore the intent to kill is conclusively inferred from the deliberate, violent use of a deadly weapon.

Malice aforethought, or criminal intention to take the life of another, must exist in the mind of the slayer at the moment he committed the overt act resulting in the death of another. In other words, the malicious intent and overt act must be coexistent. But this premeditation and malice may have existed in the mind of the slayer for only a moment before the committing of the act resulting in death. The

38 length of time which the mind of the slayer has been in the condition or state of malice, or the length of time within which the criminal intention to take life has existed, makes no difference as to the degree or grade of the crime. If it is present in the mind of the slayer when the overt act is done, and such act is done without provocation, excuse, or justification, and in cool blood, the crime is murder.

The law, however, presumes every man to be innocent until he is proved to be guilty. The defendant is not required to prove his innocence. It devolves upon the Government to prove his guilt. To do so in this case the prosecution must prove to your satisfaction, and beyond a reasonable doubt, every fact necessary to constitute the crime of either murder or manslaughter.

Not every doubt is a reasonable one. It is not a mere possible doubt, because everything relating to human affairs, and depending upon moral evidence, is open to some possible or imaginary doubt. It is not a mere captious, speculative doubt. Nor is the jury allowed to create sources or materials of doubt by reasoning to trivial and fanciful suppositions or remote conjectures as to the possible status of the case different from that established by the evidence. You are not at liberty to disbelieve as jurors if from the evidence you believe as men. Your oath imposes on you no obligation to doubt when no doubt would exist if no oath had been administered. A reasonable doubt is such a condition of the mind resulting from the consideration of the evidence before you as makes it impossible for you as reasonable men to arrive at a satisfactory conclusion. It is not a consciousness that a conclusion arrived at may possibly be erroneous, but such a state of mind as deprives you of the ability to reach a conclusion that is satisfactory. You are the sole and exclusive judges of the facts; and if, after considering all the evidence, you
39 can conscientiously say that you have an abiding conviction of the truth of the charge, you are then satisfied beyond a reasonable doubt.

It is your duty to consider the entire testimony presented, whether upon behalf of the plaintiff or the defendant; and you will give to all of the testimony just such credit and weight as in your judgment it merits. You are to determine the credibility of the witnesses who have testified; and to that end you have the right to consider their appearance upon the stand, their manner of testifying, their apparent candor in giving their testimony, or the want of such candor, the probable or improbable character of the story which they tell, the interest, if any, which any of them may have in the result of this trial, and from all the evidence in the case, and from all the circumstances surrounding it, as disclosed by the evidence, determine what the truth is.

The defendant in this case admits the homicide, but seeks to justify the killing on the ground of self-defense. You are instructed that justifiable homicide is the killing of a human being in self-defense, or in the defense of habitation, property, or person, against one who manifestly intends or endeavors by violence or surprise to commit a felony on either. A bare fear of any of these offences is not sufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fears of a reasonable man, and that the party killing acted under the influence of these fears. A person need not, however, be in actual imminent peril of his life, or of great bodily harm, before he may slay his assailant. It is sufficient if in good faith he has a reasonable belief, from the facts as they appear to him at the time, that he is in such imminent peril. And in this case, before the defendant was justified in taking the life of the deceased, the danger must have been actual or apparently
40 actual, imminent, and irremedi'ble, and it was the duty of the defendant to have first exhausted all the means within his power consistent with his safety to protect himself without killing deceased. If a man kills another through mere cowardice, or under circumstances which are not, in the opinion of the jury, sufficient to induce a reasonable and well-grounded belief of danger to life, or of great bodily harm, in the mind of an ordinarily courageous man, if you believe the defendant

to be an ordinarily courageous man the law will not justify the killing on the ground of self-defense. And mere threats on the part of the deceased, or on the part of others claimed to be associated with him, to at some future time kill or do great bodily harm to the defendant, unaccompanied by any overt act on the part of the deceased or any other person claimed to be associated with him, would not justify the defendant in taking the life of the deceased. To justify defendant in killing deceased there must have been some act or demonstration on the part of the deceased, or someone associated with him in a common purpose to take the life of defendant or do him great bodily harm at the time, or so immediately prior to the homicide, as would raise in the mind of the defendant a reasonable belief that he was about to suffer death or great bodily harm at the hands of deceased or his associates. In other words, no conspiracy or threat on part of the deceased or his associates to take the life of defendant, and unaccompanied by any overt act tending to carry such threat or conspiracy into effect, would justify defendant in taking the life of deceased.

If you believe from the evidence, beyond a reasonable doubt, that the defendant unlawfully and feloniously fired the shot which caused
41 the death of the deceased, then to reduce the killing from murder to manslaughter, you must believe, from the evidence, that the provocation for the assault arose at the time that the shot was fired, and that the passion was not the result of a former provocation; that such passion was either anger, rage, sudden resentment, or terror, which rendered the defendant incapable of true reflection upon the character and results of his acts, and that the act was directly caused by passion arising out of such provocation.

As heretofore stated to you, there are no degrees of murder under the law governing this case, and the penalty for murder prescribed by the statute is death, unless you qualify your verdict by adding thereto the words "without capital punishment;" and if you do so qualify your verdict, the punishment prescribed is imprisonment for life at hard labor. This qualification of your verdict is one purely within the discretion of the jury. Until recently death was the only penalty imposed upon a person convicted of the crime of murder; but by a recent act of the Congress it is now left with the jury to say by their verdict whether the defendant shall suffer death or be imprisoned for life at hard labor.

If you shall fail to find the defendant guilty of murder, either with or without the qualification heretofore referred to, you may, under the law of this case, find him guilty of manslaughter, if in your judgment the evidence so warrants. Manslaughter is the unlawful killing of a human being by another human being, without excuse or justification, but without malice, express or implied. The law governing this case defines manslaughter as follows:

Every person who unlawfully and wilfully, and without malice, strikes, stabs, wounds, or shoots at, or otherwise injures another, of whish striking, stabbing, wounding, shooting, or other injury such other person
42 dies, either on land or on sea, within or without the United States, is guilty of the crime of manslaughter. So in this case, if you find from all the evidence beyond a reasonable doubt that the defendant, at the time and place in the indictment charged, unlawfully

and wilfully, but without malice, under the law as it has been given you on that subject, shot and killed the deceased, then the crime is manslaughter.

Your verdict is this case should be, guilty as charged in the indictment, or guilty as charged in the indictment, followed by the words "without capital punishment," or guilty of manslaughter, or not guilty, as you shall find the facts.

(Indorsed:) No. 1327. United States vs. Homer Bird. Instructions filed Dec. 5th, 1899. Albert D. Elliot, clerk.

And afterwards, on Dec. 6th, 1899, the jury returned into open court the following verdict, to wit:

THE UNITED STATES OF AMERICA, *District of Alaska:*

In the district court of the United States for the district of Alaska.

THE UNITED STATES OF AMERICA
vs.
HOMER BIRD. } Verdict. Adjourned Nov. term, 1899.

We, the jury empaneled and sworn in the above entitled cause, find the defendant guilty as charged in the indictment.

FRANK FORREST, *Foreman.*

43 (Indorsed:) No. 1327. United States of America vs. Homer Bird. Indictment for murder. Verdict. Filed Dec. 6th, 1899. Albert D. Elliot, clerk. Whereupon the jury are discharged from further attendance in this cause.

And afterwards, on Dec. 7th, 1899, the defendant filed his motion for a new trial, which is as follows, to wit:

In the United States district court for the district of Alaska.

THE UNITED STATES
vs.
HOMER BIRD.

Now comes the defendant, by his attorneys and in person, and moves the court to set aside and hold for naught the verdict in this case rendered on the 6th day of Dec., 1899, and grant him a new trial for the following reasons, to wit:

I.

Because of the error of the court in overruling the defendant's motion for a continuance herein.

II.

Because of the error of the court in compelling him to go to trial against his objections before the jury sworn and impannelled in this case, for the following reasons, to wit: That as shown by the record herein

this defendant, at the time of his arraignment in this case, was served with a jury list of the petit jurors for this term of court containing seventy-five names; that at the time that this defendant was put upon his trial herein there were only forty-three of said names in the box to be drawn, and that twenty-four of the said jurors whose names were so originally drawn from the box and placed on said jury list had, without the knowledge or consent of this defendant, been excused by the
44 court from further attendance, and that this excusing of the jurors drawn by law for the panel of jurors for the term made it necessary to summon talesmen to complete the jury on the trial of this defendant, and the defendant has thereby been denied a substantial right guaranteed him by law, to wit: A right to have the jury panel from which the jury for his trial is to be selected drawn by law, and to have a reasonable opportunity to obtain full information for his guidance in exercising his right of challenge both for cause and peremptory before his trial.

III.

For the error of the court in sustaining the challenge of the Government for cause over the objections and resistance of defendant to the following jurors, to wit: George Walker, D. Ledbetter, M. Rober, C. L. Parish, and H. Patterson; that the Government's chalienge for cause to such jurors made upon their voirdire was that said jurors had served as jurors within one year next before the convening of said term of the court. Said jurors answering upon their voirdire that they had been summoned within the said year upon no regular jury, or in no regular term of court, but had merely served upon one particular case for which they were summoned as talesmen, and such service is not under the law a case for challenge for cause.

IV.

For the error of the court in overruling the challenge of the defendant for cause to the jurors C. M. Summers and Shaw, both of whom, when examined upon their voirdire, stated that they had formed opinions upon this case which it would require evidence to remove, and that the defendant thereupon challenged said jurors, the court overruling said challenge, thereby compelling the defendant to exhaust a per-em'tory challenge upon each of said jurors or to go to trial before jurors, in all prob'ility, with the burden of proof as to his innocence imposed upon him.

45 V.

For the error of the court in over'uling the objections to the method of examining pursued by the Government's counsel in introducing the testimony of the witness Charles Sheffler in the following particulars, to wit: As shown by the bill of exceptions, the prosecuting attorney asked said witness Scheffler the following questions:

"Q. State whether or not, during your trip from St. Michael to the place where you finally went into winter quarters, the conduct of this

defendant towards each and all of the party was domineering and arbitrary, he manifesting a high temper."

To which question defendant, by his counsel, objected for the following reasons, to wit: That the same was leading and suggestive and called for a conclusion of the witness, which objection the court sustained. Thereupon the prosecuting attorney propounded the following questions to said witness:

"Q. State generally what was the bearing of this defendant towards the party, individually and collectively, from the time you left St. Michael's until you went into winter quarters."

To which the defendant, by his counsel, objected for the same reasons as stated above, and for the further reason that the prosecuting attorney had, by the question just preceding, to which court had al/ready sustained an objection, suggested to the witnes' the answer he desired and expected, and by allowing this question now propounded the court in effect allowed the prosecution to lead and suggest to the witness the testimony desired, which objection was by the court over'uled; and the witness thereupon testified that defendant's conduct was disagreeable to all the party; that he was in the habit of cursing them and abusing the men in the party, etc., as shown by the record.

46

VI.

For the error of the court in admitting, over the objections of the defendant, the testimony as to the killing of one R. L. Patterson, and especially that part of the testimony of the witness Naomi Strong and Charles Sheffler as to the shooting of R. L. Patterson by the defendant, or at the said Patterson, while he was in the water, as is shown more fully in the bill of exceptions.

VII.

For the error of the court in admitting in evidence to the jury the tes'imony of the witness Blain as to the alleged confession and admission of the defendant to him, for the reason that it was shown by the testimony of said witness Blain that such admissions were made under duress and fear of personal violence, for that the defendant would be lynched unless such admissions, or substantially such admissions, were made by him.

VIII.

For the error of the court in admitting in evidence to the jury, over the objections of the defendant, the testimony of the witness Vawter as to the escape of defendant from St. Michael.

IX.

For the error of the court in refusing, at the request of the defendant's counsel, to stop the remarks of the district attorney in his closing argument to the jury, when, as shown by *by* the bill of exceptions, the said district attorney was arguing to the jury in effect that counsel for defendant knew he was *was* guilty and were excepting to confession because they

were availing themselves of every technicality in the hopes of securing a reversal of the case, such argument tending to prejudice the jury against the defendant in the minds of the jury, and thereby compelling
47 the defendant to either waive substantial legal rights that his counsel believed he was entitled to, or else submit to having the saving of such rights construed into a confession of guilt by his counsel, and the over'uling of the objection to such remarks by the court was tantamount to an approval by the court of the conclusion the prosecuting attorney was seeking to draw therefrom, to wit, that the saving of the defendant's objections in the record was a confession of guilt.

10.

For the error of the court in refusing to give written instructions to the jury before the arguments began, as shown by the bill of exceptions.

XI.

For the error of the court in giving the seventh paragraph of the instructions asked by the Government on the subject of escape.

XII.

For the error of the court in giving the instructions shown on the first page of the instructions prepared by the court, for the reason that the same are calculated to prejudice the defendant in the minds of the jurors and induce them to believe that it was their duty, as representatives of the United States, as therein informed, and as protectors of the life and liberty of the individual, as well as the property, and safety of society, to convict the defendant, and because the instructions contained in such page are argumentative and not necessary or proper to enable the jury or to guide the jury in properly passing upon the facts of the case, but were calculated to draw their consideration from the facts of the case to some imaginary duty as public guardians.

XIII.

For the error of the court in not allowing the filing and send-
48 ing out with the jury the written instructions prepared and given to the jury herein, thereby compelling the jury to rely upon their own memory as to the contents of such instructions as to how they were to be guided in arriving at their verdict, and denying to the defendant the substantial right to have the written instructions before the jury, as commanded by law.

XIV.

The verdict in this is contrary to the law and the evidence in this, that the evidence clearly shows that the witnesses Naomi Strong and Charles Scheffler were accomplices in the killing of the deceased J. H. Hurlin, and their testimony as to the facts which would make such killing a crime is nowhere corroborated by any other evidence. And for the errors above

assigned, and other errors manifest of record herein, the defendant prays said verdict be set aside, and that he be awarded a new trial.

T. R. LYONS &
MALONY AND COBB,
Att'r's for Def.

UNITED STATES OF AMERICA, *District of Alaska, ss:*

I, J. H. Cobb, being first duly sworn, depose and say that I 'as one of the attorneys for defendant in the trial of the case of The United States vs. Homer Bird, in which a verdict was returned on the 6th day of Dec., 1899; that as such atto'ney I was present in court when the jury was charged in such case; and when they returned into court with the verdict the instructions given to the jury were in writing and were read to them by the court, and after being so read were filed with the
49 clerk on the 5th day of December, 1899. Said instructions were not given to the jury to take with them into their retirement and while considering of their verdict, but remained with the clerk and were not brought back by the jury with their verdict and returned into court by them at the time of the return of their verdict.

J. H. COBB.

Subscribed a*b*d sworn to before me this 7th day of December, 1899.
[Notarial seal.]
M. GRINNELL,
Notary Public for Alaska.

UNITED STATES OF AMERICA, *District of Alaska, ss:*

I, Frank Forrest, being first duly sworn, depose and say, that I was foreman of the jury in the case of The United States vs. Homer Bird, which returned the verdict therein on Dec. 6th, 1899; that said jury, after the reading of the charge of the court, did not take with them into their retirement to consider of said verdict any of the written instructions given by the court, nor did they have with them in their retirement, at any time, any such instructions.

GEO. F. FORREST.

Subscribed and sworn to before me this 7th day of Dec., 1899.
[Seal of the court.]
ALBERT D. ELLIOT,
Clerk U. S. Dist. Crt. for Alaska.

A copy of the foregoing motion for a new trial in within the entitled cause is accepted, and service of the same hereby acknowledged this 7th day of Dec., 1899.

ROBERT A. FRIEDRICH,
U. S. Dist. Atty.

(Indorsed:) No. 1327. In the United States district court in and for the district of Alaska. The United States, plaintiff, vs. Homer Bird, defendant. Motion for a new trial. Filed Dec. 7, 1899. Albert D. Elliot, clerk. Malony & Cobb and T. R. Lyons, attys. for defendant.

50 And afterwards, on December 9, 1899, the following affidavit was filed in said cause, and is in words and figures following, to wit:

In the district court of the United States in and for the district of Alaska.

THE UNITED STATES,)
vs.) Affidavit. No. 1327.
HOMER BIRD.)

Robert A. Friedrich, being first duly sworn, deposes and says: I am the United States attorney for the district of Alaska, and was such attorney for the United States during the adjourned November, 1899, term of said district court and during the trial of said above-named cause.

That the trial of criminal causes was moved by me on the 14th day of November, 1899, and the trial of criminal causes thereupon begun. That the case of the United States vs. Homer Bird, case No. 1327, was duly set for trial by me on the 17th day of November, 1899, for the twentieth day of November, 1899. That on the eighteenth day of said month the defendant, by and through his attorneys, Messrs. Malony & Cobb, esqs., moved the court for a continuance of the trial of said cause to a subsequent term of said court, which said motion, after the same had been duly argued by affiant and defendant's attorneys, was duly denied. That thereafter said attorneys stated to the court that the wife of said defendant, with witnesses and means to pay counsel and other necessary expenses in defense of said defendant, were upon their way from New Orleans to Juneau; that thereupon the court adjourned the trial of said case until such time as defendant's wife as aforesaid should arrive at Juneau, but in no event such continuance should take said case over the term. That the wife of said defendant did arrive on the 26th day of November, 1899, and brought with her a witness, who was sworn and testified in the cause, one Mrs. Kitty Van Horn, but did not bring with her any one of the persons named in defendant's affidavit filed in support of motion for continuance, whom it was claimed resided in New Orleans. That affiant was informed by counsel for defendant that she had brought with her
51 sufficient means to employ counsel in the defense of said Bird.

That five days after the arrival of Mrs. Bird, namely, on the first day of December, 1899, the trial of the said defendant began. Further affiant saith not.

ROBT. A. FRIEDRICH.

Subscribed and sworn to before me this 8th day of December, 1899.

[COURT SEAL.] ALBERT D. ELLIOT,
Clerk U. S. Dist. Ct., Alaska.

Service of true and correct copy of within affidavit acknowledged this day of December, 1899.

MALONY & COBB,
Atty'. of Deft.

(Endorsed:) No. 1327. District court United States, district of Alaska. United States vs. Homer Bird. Affidavit of R. A. Friedrich. Filed Dec. 9, 1899. Albert D. Elliot, clerk. Robert A. Friedrich, United States attorney.

52 And afterwards, on December 9, 1899, the following affidavit was filed in said cause, in words and figures following, to wit:

In the United States district court for the district of Alaska.

THE UNITED STATES
vs.
HOMER BIRD. } Affidavit 2. Case No. 1327.

Wallace W. Blaine, being first duly sworn, deposes and says: That on the fifteenth day of April I was appointed special officer at St. Michael, Alaska, by United States Commissioner L. B. Sheperd, and directed by him to proceed to the scene of the killing of Robert L. Patterson and J. H. Hurlin, and take charge of the body of said Robert L. Patterson and bring the same to Saint Michael, Alaska, in order that an inquest might be had upon the same, and also to take charge of the witnesses Naomi Strong and Charles Sheffler and bring them to Saint Michaels, in order that they might testify at said inquest. That Corporal James W. Helms, of the U. S. Army, was sent by the military authorities to arrest Homer Bird, and never had charge of the said witnesses as mentioned in said Bird's affidavit filed in support of his motion for continuance of this cause. That affiant had full charge of said witnesses from the time that he took charge of them until he arrived at Saint Michaels and turned them over to Deputy U. S. Marshal C. L. Vawter. That on the way down the river from the place of starting to Saint Michaels, said Helms did not travel in the party in which were the witnesses Sheffler and Naomi Strong, but that said Helms was from one-quarter of a mile to six miles in the rear of said party; that we occassionally had meals together, in which all of said parties, including the defendant Bird, were present; on such occassions I was always present myself, and no conversation was ever had between Helms and said witnesses, or either of them, in which said witnesses, or either of them, made any statement whatsoever contrary to their evidence given at the coroner's inquest. That during the time I

53 was with said witnesses on the way down I made inquiries of them as to the facts concerning the killing by Bird of Hurlin and Patterson, and at no time did their statement or replies in any wise differ on any material point from their evidence as given at such coroner's inquest, or their evidence which I am informed they gave on the trial of this case. At no time did said witnesses, or either of them, ever in my hearing make the statement or any statements approximating the statement set out in affiant's affidavit in support of his application for a continuance of this case, which said affidavit has been read to me, although I have also had frequent other conversations with said witnesses at Saint Michaels while they were detained there and since that time.

I heard Corporal James W. Helms, the person mentioned in defendant's said affidavit, testify before said coroner's inquest at Saint Michaels, and also had frequent conversations with him concerning this case; at no time did he ever claim to have any personal knowledge of the facts in said case or to have heard either of the witnesses, Strong or Sheffler, make any statement contrary to their testimony before the coroner's jury, or, as I am informed, they testified at the trial of this case. That said

Helms frequently expressed in my hearing that he believed from all that he had heard in the case that the defendant was guilty of murder and ought to be hanged. Said Helms told affiant that while he was acting as guard over Bird that said Bird requested Helms at Anvik, Alaska, to leave a certain large knife where said Bird could get hold of it in order that he, Bird, might kill, as he expressed it, "that Dutch son of a bitch of a Sheffler;" that if he would do so he would kill him while they were eating dinner.

Helms also informed me that while he was acting as guard at the jail at Saint Michaels, defendant Bird offered him, Helms, two thousand dollars if he would connive at and assist him, Bird, in making his escape from said jail and from the custody of the officials.

That during the detention of said Bird at Saint Michaels, until said Bird was taken from there to Sitka, said Helms was a continuous resident of Saint Michaels. Further affiant saith not.

54 WALLACE W. BLAIN.

Subscribed and sworn to before me this 8th day of December, 1899.

[COURT SEAL.] ALBERT D. ELLIOT,
Clerk U. S. Dist. Court, Alaska.

Service of true and correct copy of within affidavit acknowledged this day of December, 1899.

MALONY & COBB,
Attys. for Deft.

(Endorsed:) No. 1327. District court United States, district of Alaska. United States vs. Homer Bird. Affidavit of Wallace W. Blain. Filed Dec. 9, 1899. Albert D. Elliot, clerk. Robt. A. Friedrich, United States attorney.

55 And afterwards, on December 9, 1899, the following affidavit was filed in said cause, and is in words and figures following, to wit:

In the district court of the United States for the district of Alaska.

THE UNITED STATES
vs.
HOMER BIRD. } Affidavit. No. 1327.

C. L. Vawter, being first duly sworn, deposes and says:

I am the deputy United States marshal for the district of Alaska, stationed at St. Michaels.

The defendant, Homer Bird, arrived at St. Michaels on the sixteenth of June, 1899, in charge of the military, and was turned over to my custody on the 27th day of the same month. From that time on until the fifth of October, 1899, the time of departure of said Bird on the revenue cutter "Bear" for Sitka, every possible facility and opportunity was afforded said Bird for writing letters, subpœnaing witnesses, and communicating with his friends in New Orleans, La.

During said period of time mail left Saint Michaels, on an average, at least once every ten days. As early as July I mailed letters for Bird addressed to his wife in New Orleans, La., postage prepaid. On the twelfth day of August, 1899, at the request of Bird I registered a letter which he had written to his wife at New Orleans, La., taking a receipt therefor from the postmaster at Saint Michaels, which said receipt is hereto attached, marked "A," and made a part hereof.

Affiant further says that about the tenth day of August, 1899, he received from the wife of defendant at New Orleans a registered letter, addressed to the authorities at Saint Michaels, concerning this case, which said letter, together with the envelope in which it was contained, are hereto attached, and marked "B" and "C, and made a part hereof. Soon after the arrival of said Bird at Saint Michaels—namely, in June, 1899—he retained as counsel for his preliminary hearing and the preparation of his defense Kenneth M. Jackson, esq., former United States commissioner at Wrangel', Alaska, an attorney at law, then practising at Saint Michael'.

56 That Mr. Jackson had free access to said Bird to consult with him at all times, and did hold many interviews with said Bird prior to the time of the preliminary examination of said Bird. That said Jackson appeared at the said preliminary examination of the said Bird before U. S. Commissioner L. B. Shepard as attorney for the defendant. That said Bird or his attorney made no request or application for the subpœnaing or attendance of any witnesses on his behalf to appear at said preliminary examination or at Sitka.

That Corporal J. W. Helms, the person mentioned in the affidavit of the defendant Bird, filed in connection with a motion for continuance of the trial of his said cause, was present at Saint Michaels during the entire time that Bird was there, and appeared as a witness and testified before the coroner's inquest, and, on being duly sworn, testified in substance that he knew nothing of the facts of the alleged killing by Bird of Hurlin and Patterson, but could only identify the body of Patterson as being the man who was brought down from Anvik to Saint Michaels; that said Helms, on or about September 30th, was discharged from the Army and became a guard under affiant at the jail at Saint Michaels, in which said Bird was confined while there; that from frequent statements and conversations affiant heard from said Helms, and from the facts within his personal knowledge, he knows that said Helms had no knowledge of any of the facts connected with the alleged murder except from general rumor and hearsay; that he frequently heard said Helms, up to the time that said Bird left Saint Michaels in charge of the authorities, express his belief, based upon all that he, Helms, had heard of the facts and circumstances, that said Bird was guilty of the crime of murder and ought to be hanged.

That said Helms, while acting as guard at the jail at Saint Michaels, as aforesaid, informed affiant that the said defendant, Homer Bird, while in said jail, had offered Helms a bribe of two thousand dollars if he would connive at and assist in the escape of said Bird from prison and from the custody of the officials.

57 That in addition to ex-Commissioner Jackson said Bird retained and consulted with Oliver P. Hubbard, esq., an attorney at law, residing and practicing at Saint Michaels, while said Bird was at

Saint Michaels, and in July said Hubbard wrote a letter for said Bird to the wife of said Bird in New Orleans, informing her as to the probable time of Bird's trial at either Sitka or Juneau, a copy of which said letter was shown to said affiant by said Hubbard. That affiant had previously informed said Bird and his attorneys of the probable time and place of the trial of said Bird, namely, in October and November, and at Sitka or Juneau. That during the time of said Bird's confinement at Saint Michael' he received letters from New Orleans, La. That in the letters that were mailed for Bird at Saint Michaels he informed his wife and communicated to her the probable time and place of his trial, told her whom to bring with her to Alaska, and the manner in which she could raise funds. That in such letters Bird also enclosed letters for other persons, instructing his wife to deliver them.

Further affiant saith not.

C. L. VAWTER.

Subscribed and sworn to before me this 8th day of December, 1899.

[COURT SEAL.] ALBERT D. ELLIOT,
Clk. U. S. Dist. Ct., Alaska.

58 *Registry receipt.*

A.

Post-office at St. Michael. Registered letter No. 660. Rec'd 8/12, 1899, of A. H. Bird, St. Michael, addressed to Mrs. A. H. Bird, New Orleans, La.

R. T. LYNG, P. M., St. Michael, Alaska.

B.

To the Authority*s* of St. Michaels Military Prison,
St. Michaels,
Alaska.

[5-cent postage stamp.]

New Orleans, La., Jul. 20. Reg. No. 2691.
Mrs. A. H. Bird, 1118 Thalia St., New Orleans, La.

59 C.

NEW ORLEANS, *July 20th, 1899.*

*To the Authority*s *of St. Michaels Prison.*

DEAR SIRS AND GENTLEMEN: Having seen a dispatch in the New Orleans papers, purporting to be sent from Seattle, in which it reads of a crime being committed in Alaska by Homer Bird, and that they said H. Bird and the two alleged witnesses are now in St. Michael prison awaiting a hearing; now, if any such crime has been committed, will you be so kind as to let me know, and if any disposition has been made of his case; if not, will you please stay proceedings until you can communicate with New Orleans, as a great deal of assistance can be rendered. We can show that Homer Bird was the moneyed man of the party and can prove that he is a business man and well liked. If no

disposition has been made in his case will you try and get him admitted to bail, as collateral can be deposit' at New Orleans custom-house and papers sent through Washington. Please let him know that I am broken hearted and would like to see him very much, and tell him that we are doing all we can for him.

Hoping I am not asking to' much, and that you will do all you can for a broken-hearted wife and mother of five children,

I remain, yours, truly,

Mrs. HOMER BIRD,
1118 Thalia St., New Orleans, La.

Please give this medal to Mr. Bird.

Service of a true and correct copy of within affidavit acknowledged this day of December, 1899.

MALONY & COBB,
Attys. for Defendant.

60 (Endorsed:) No. 1327. District court, United States, district of Alaska. United States vs. Homer Bird. Affidavit of C. L. Vawter. Filed Dec. 9, 1899. Albert D. Elliot, clerk. Robert A. Friedrich, U. S. attorney.

61 And afterwards, on December 9, 1899, the following motion was filed in said cause and is in words and figures following, to wit:

In the United States district court for the district of Alaska.

UNITED STATES)
vs.
HOMER BIRD.)

Now comes the defendant by his attorneys, and moves the court to strike from the files herein the affidavits of Robert A. Friedrich, Wallace W. Blain, and C. L. Vawter, this day served and filed in this cause, for the following reasons, to wit;

I.

Because said affidavits relate to and affect only the application for a continuance herein, filed on the 18th day of November, 1899, and long since acted upon and overruled by the court, and do not relate to or controvert any evidence filed in support of the motion for a new trial, and said affidavits are now served and filed too late to avail the plaintiff or be in any manner considered by the court.

II.

Said affidavits are not served or filed within one day after the serving and filing of the motion for a new trial, and no reason is given why the same were not so served and filed, and are therefore too late.

LYONS & LYONS and MALONY & COBB,
Counsel for Defendant.

A copy of the foregoing motion in the within-entitled cause is accepted and service of the same hereby acknowledged this 9th day of December, 1899.

ROBT. A. FRIEDRICH,
U. S. District Attorney.
By ALFRED J. DALY,
Asst. U. S. Atty.

(Endorsed:) No. 1327. In the district court of the United States for the district of Alaska. United States, plaintiff, vs. Homer Bird, defendant. Motion to strike out affidavits. Filed Dec. 9, 1899. Albert D. Elliot, clerk. Malony & Cobb and T. R. Lyons, attorney' for deft.

62 And afterwards on Dec. 9, 1899, the following order was made and entered of record, to wit:

UNITED STATES, PLFF., *vs.* HOMER BIRD, DEFT. } No. 1327. Order denying motion.

Now, at this day, this cause coming on to be heard upon the motion of defendant on file herein to strike from the files the affidavits of Robert A. Friedrich, Wallace Blaine, and C. L. Vawter, and the court having heard the arguments of the respective counsel, denies said motion, but, in view of this ruling, hereby grants defendant leave to file counter-affidavits.

63 And afterwards, on December 11, 1899, the following affidavit was filed in said cause, and is in words and figures following, to wit:

In the United States district court in and for the district of Alaska.

THE UNITED STATES *vs.* HOMER BIRD. } Affidavit of Homer Bird.

UNITED STATES, *District of Alaska, ss:*

I, Homer Bird, being first duly sworn on oath deposes and say, that I am the defendant in the above-entitled action; that, referring to the affidavits of C. L. Vawter and W. W. Blain, I depose and say that it is not true that I offered a bribe of two thousand dollars, or any other sum whatever, to the said Helms, as therein mentioned. I further depose and say that while I was at St. Michael, which is about two thousand five hundred miles from the town of Juneau, where I have been tried, I had no time and had no means to procure the attendance of witnesses, nor could I then secure process of the court to compel the attendance of such witnesses. I further depose and say that if given an opportunity I can still procure the testimony of the witnesses John Tompkins and Jensen, in addition to the testimony of the witnesses mentioned in the application for a continuance; that the testimony of the said witnesses Tompkins and Jensen is material in the following particulars: That said witnesses were at and saw the scow or boat in which the killing

of J. H. Hurlin and the shooting of Robert L. Patterson occurred on the 27th day of September, 1898; said witnesses can and will testify that the shot marks on the side and covering of said scow made by the shotgun used by defendant were towards the fron' end of said scow where they could not possibly have been made had said shooting occurred in the manner testified to by the witnesses Charles Sheffler and Naomi Strong on said trial; that affiant did not know of the materiality of said witnesses at the time of his application for a continuance herein, and did not acquaint his attorneys of the existence of such witnesses for
64 that reason; that such evidence only became material because of the fact that the witnesses Charles Sheffler and Naomi Strong did, upon the trial of this cause, testify falsely as to the immediate circumstances of said killing, in that they testified that the defendant shot and killed said Hurlin while he was sit'ing with his back towards defendant and at or near the stern of said scow, when in truth and in fact the said Hurlin was in a kneeling position, seeking to get his gun from under his bed on the left-hand side of the scow, with his face towards said side and towards the front or bow end thereof at the time the said shooting, and the said Patterson was just beyond the said Hurlin towards the bow of said boat and passing out from the awning or covering thereover at said time.

Referring to said affidavits of C. L. Vawter, affiant says it is not true that in the letters he wrote his wife from St. Michael he communicated to her the probable time and place of his trial and told her whom to bring with her to Alaska; that defendant at that time had not been indicted and did not know and had no means of knowing the probable time and place of such trial. And further affiant saith not.

A. H. BIRD.

Subscribed and sworn to before me this 11th day of December, 1899.

[SEAL.] J. H. COBB,
Notary Public for Alaska.

(Endorsed:) No. 1327. In the district court of the United States for the district of Alaska. The United States, plaintiff, vs. Homer Bird, defendant. Affidavit of Homer Bird. Filed Dec. 11, 1899. Albert D. Elliot, clerk. Malony & Cobb and T. R. Lyons, attorney' for defendant.

65 And afterwards, on December 11, 1899, the following affidavit was filed in said cause, and is in words and figures following, to wit:

In the United States district court in and for the district of Alaska.

THE UNITED STATES } Affidavit of Mrs. A. H. Bird.
vs.
HOMER BIRD. }

UNITED STATES OF AMERICA, *District of Alaska, ss:*

I, Mrs. A. H. Bird, being first duly sworn, depose and say: Referring to the affidavit of C. L. Vawter, filed in this cause, affiant says that she

did not at any time receive from the said C. L. Vawter, or from any other of the authorities at St. Michael, Alaska, any reply whatsoever to the registered letter mentioned in said affidavit of C. L. Vawter, giving her the information she therein sought, or any information whatever; affiant further says that the letter of said Oliver P. Hubbard, mentioned in said affidavit of C. L. Vawter, did not inform her as to the probable time of the defendant's trial at either Sitka or Juneau; that said letter did state that he would probably be tried in the said month of July, or shortly thereafter, at Sitka. Affiant further says that it is not true that in the letters received by her from defendant while he was at St. Michael he communicated to her the probable time and place of his trial, or told her whom to bring with her to Alaska; that affiant received only two letters from defendant while he was at St. Michael, and that said information alleged in said affidavit was not contained in either of said letters; that affiant has never received any instructions or directions from anyone to bring with her to Alaska witnesses as to the good character of defendant, and had she received such information and direction since the return of the indictment herein she does not believe that in the limited time given her such testimony could have been procured and produced on this trial.

66 And further affiant saith not.

Mrs. A. H. BIRD.

Subscribed and sworn to before me this 11th day of December, 1899.

[SEAL.] M. GRINNELL,
Notary Public for Alaska.

(Endorsed:) No. 1327. In the district court of the United States for the district of Alaska. The United States, plaintiff, vs. Homer Bird, defendant. Affidavit of Mrs. A. H. Bird. Filed Dec. 11, 1899. Albert D. Elliot, clerk. Malony & Cobb and T. R. Lyons, attorney' for defendant.

67 And afterwards the following order was made and entered of record in said cause on Dec. 11th, 1899, to wit:

UNITED STATES, PLAINTIFF, *vs.* HOMER BIRD, DEFENDANT.	No. 1327.	Order denying motion for a new trial.

Now at this day, the motion for a new trial in this cause coming on to be heard, defendant being present in person and Messrs. Malony & Cobb appearing for defendant in support thereof, and Robert A. Friedrich, U. S. attorney, appearing for plaintiff in opposition thereto, and the court having heard the arguments of the respective counsel, and being fully advised in the premises, denies said motion, defendant duly excepting to the ruling of the court.

It is further ordered that defendant have sixty days from the date of adjournment of this term of court within which to settle his bill of exceptions and to apply for a writ of error.

It is further ordered that defendant be required to *to* appear for judgment and sentence on Wednesday next, at 10 o'clock a. m.

And afterwards, on Dec. 13th, 1899, the following judgment and sentence was rendered and entered of record, to wit:

In the district court of the United States for the district of Alaska.

68 UNITED STATES OF AMERICA, *vs.* HOMER BIRD. } Judgment and sentence.

This day having been heretofore fixed by the court as the day upon which judgment and sentence would be rendered against said defendant, Homer H. Bird, upon the verdict of the jury, heretofore duly returned, whereby said defendant was and is found guilty of the crime of murder, as charged in *in* the indictment herein, and without any qualification of said verdict, the defendant being present in person and by his attorneys, Messrs. Malony & Cobb, and the United States being represented by Robert A. Friedrich, esq., present U. S. attorney for this district; and a motion for a new trial having been duly argued, submitted, and overruled by the court, the court asked the defendant if he had anything to say why judgement and sentence should not now be pronounced against him; and the court being fully advised in the premises,

It is now considered and adjudged, and it is the judgment and sentence of the court that the defendant, Homer Bird, be taken hence by the United States marshal for this district to the jail or penitentiary at Sitka, Alaska, and there confined and safely kept until Friday, the ninth day of February, in the year of our Lord one thousand nine hundred; and that on said Friday, the ninth day of February, nineteen hundred, he, the said defendant, be taken by the United States marshal of said district, to some suitable place, to be designated by said marshal, within said jail or the inclosure thereof, and at such hour as said marshal shall designate on said day, between the hours of ten o'clock in the forenoon and four o'clock in the afternoon, hanged by the neck until he is dead. The

69 due execution of this judgment and sentence shall be in all things conducted in accordance with the provisions of the law relating thereto, and a warrant for the execution of the same shall duly issue to said marshal.

Dated December 13, 1899.

CHARLES S. JOHNSON,
United States District Judge for the District of Alaska.

(Indorsed:) No. 1327. United States vs. Homer Bird. Judgment and sentence. Filed December 13, 1889. Albert D. Elliot, clerk.

70 And afterwards, on December 13, 1899, the following warrant was issued in said cause, and is in words and figures following, to wit:

In the district court of the United States for the district of Alaska.

THE UNITED STATES OF AMERICA
vs.
HOMER BIRD. } Warrant.

THE UNITED STATES OF AMERICA, *District of Alaska, ss:*

The President of the United States to the marshal of the district of Alaska, greeting:

Whereas at the adjourned November term of the above-entitled court the above-named defendant, Homer Bird, was duly convicted of the crime of murder, the verdict in said case having been duly rendered on the 6th day of December, 1899, and the same being in no manner qualified, contrary to the form of the statute made and provided, and against the peace and dignity of the United States of America, for which offence the said defendant, Homer Bird, hath received the following judgment and sentence of our said court, to wit:

"This day having been heretofore fixed by the court as the day upon which judgment and sentence would be rendered against said defendant, Homer Bird, upon the verdict of the jury, heretofore duly returned, whereby said defendant was and is found guilty of the crime of murder, as charged in the indictment herein, and without any qualification of said verdict, the defendant being present in person and by his attorneys, Messrs. Malony & Cobb, and the United States being represented by Robert A. Friedrich, esq., present United States attorney for this district; and a motion for a new trial having been duly argued, submitted, and overruled by the court, the court asked the defendant if he had anything to say why judgment and sentence should not now be pronounced against him; and the court being fully advised in the premises:

"It is now considered and adjudged, and it is the judgment and
71 sentence of the court, that the defendant, Homer Bird, be taken hence by the United States marshal for this district to the jail or penitentiary at Sitka, Alaska, and there confined and safely kept until Friday, the ninth day of February, in the year of our Lord one thousand nine hundred; and that on said Friday, the ninth day of February, nineteen hundred, he, the said defendant, be taken by the United States marshal of said district to some suitable place, to be designated by said marshal, within said jail or enclosure thereof, and at such hour as said marshal shall designate on said day, between the hours of ten o'clock in the forenoon and four o'clock in the afternoon, hanged by the neck until he is dead. The due execution of this judgment and sentence shall be in all things conducted in accordance with the provisions of the law relating thereto, and a warrant for the execution of the same shall duly issue to said marshal."

In accordance with said judgment and sentence this warrant is hereby issued, and this is to command you to well and faithfully execute the same, and the judgment and sentence in said warrant recited, in all things in accordance with the law governing the same and make due return hereof. Hereof fail not at your peril.

Witness the signature of Charles S. Johnson, judge of said district court, and the signature of Albert D. Elliot, clerk of said court, and the

seal of said court, affixed at Juneau, in said district, this thirteenth day of December, in the year of our Lord one thousand eight hundred and ninety-nine.

CHARLES S. JOHNSON,
United States District Judge for the District of Alaska.

Attest:
ALBERT D. ELLIOT, *Clerk.*
[COURT SEAL.]

(Endorsed:) No. 1327. United States vs. Homer Bird. Warrant.

72 And afterwards, on December 15, 1899, the following affidavit was filed in said cause, and is in words and figures following, to wit:

In the United States district court in and for the district of Alaska.

THE UNITED STATES)
vs.
HOMER BIRD.)

Homer Bird being first duly sworn deposes and says, on oath, that he is the defendant in the above-entitled action, that he has no means with which to pay the costs and disbursements of this cause; that it is necessary in order to properly make up the record for appeal in this cause that the stenographer's notes taken on the trial hereof be extended in longhand and filed as a part of the record herein; wherefore he prays that an order of the court be entered, directing such notes to be so extended and filed as a part of the record, at the expense of the Government.

A. H. BIRD.

Subscribed and sworn to before me this 15 day of December, 1899.
[SEAL.]
J. H. COBB,
Notary Public for Alaska.

(Endorsed:) No. 1327. In the district court of the United States for the district of Alaska. United States, plaintiff, vs. Homer Bird, defendant. Affidavit of inability to pay costs. Filed December 15, 1899. Albert D. Elliot, clerk. Malony & Cobb, attorney, for deft.

73 And afterwards, on December 15, 1899, the following order was made and entered of record in said cause, to wit:

In the United States district court in & for the district of Alaska.

THE UNITED STATES)
vs.
HOMER BIRD.)

Upon considering and filing of the affidavit of defendant in this cause upon this day, it is ordered that F. D. Kelsey, the court stenographer,

be directed to extend the shorthand notes taken upon the trial of this cause, and file the original as part of the record herein, and supply a carbon copy thereof to the defendant's counsel and to the U. S. district attorney.

CHARLES S. JOHNSON, *Judge.*

Dec. 15th, 1899.

(Endorsed:) No. 1327. U. S. district court for Alaska. The United States vs. Homer Bird. Order. Filed December 15/99.

ALBERT D. ELLIOT, *Clerk.*

74 And afterwards, on the 31st day of January, 1900, the following order was made and entered of record, to wit:

UNITED STATES, PLAINTIFF, *vs.* HOMER BIRD, DEFENDANT. } No. 1327. Order staying execution.

No' on this 31st day of January, 1900, upon motion of Malony & Cobb, attorneys for the defendant, and for good cause shown, the execution of the sentence and judgment of the court in the above entitled cause is postponed until Friday, the second day of March, 1900, upon which said date the original sentence and judgment of the court herein entered directing and commanding the execution of the sentence and judgment of the court herein shall be carried into effect, unless in the meantime otherwise ordered by the court herein; and a copy of this order is hereby directed to be served upon the United States marshal in and for the District of Alaska.

CHARLES S. JOHNSON, *Judge.*

Service of the above and foregoing order is admitted to have been duly and legally made on this the 31st day of January, 1900.

JAMES M. SHOUP,
U. S. Marshal for Alaska.

(Indorsed:) No. 1327. The United States *vs.* Homer Bird. Order staying execution. Filed Jan. 31st, 1900. Albert D. Elliot, clerk.

75 And afterwards, on the 8th day of February, 1900, defendant filed his bill of exceptions, which is as follows, to wit:

In the United States district court for the district of Alaska.

UNITED STATES *vs.* HOMER BIRD. }

Be it remembered that on the trial of the above entitled and numbered cause the following proceedings and were had, to wit:

1st. On the 15th day of November, 1899, the indictment in this cause having been returned on the 9th day of November, 1899, this cause was caused to be set for trial at this term, and ther'upon defendant presented his application for a continuance, which is shown in the record herein, and for the reasons therein stated; and the court having heard said application over'uled the same, and set the cause for trial on Dec. 1st, 1899, to which ruling of the court defendant duly excepted.

2nd. And on the 9th day of November, 1899, the defendant was duly served with a list of names purporting to be a list of petit jurors dr'wn for the present term of the district court for the district of Alaska, and to be the panel of jurors from which the trial jurors for the trial of this cause would be drawn; said list contained the names of seventy-five persons as composing said panel. Afterwards, on the 1st day of
76 December, 1899, when the defendant was put upon trial, it appeared that of said seventy-five persons whose names appeared upon the said list served upon the defendant there remained only forty-three of said names in the box, from which said jury was being drawn. It further appeared that twenty-four jurors on said list of jurors served upon defendant had been excused by the court prior to the calling of this cause for trial, and of the remaining eight persons missing from said list whose names were not in the box one was sick and the remaining seven had not been served by the marshal. Defendant thereupon objected to further proceedings with the trial of said cause at said time, and the further selecting and drawing of said jury from said box, because he had not been served with a correct list of the names in such jury box, and because twenty-four jurors whose names appeared upon the list served upon the defendant had been excused without the consent of the defendant, and the defendant was thereby denied his legal right to be tried by a jury selected from the panel served upon him; but the court overruled said objection and ordered the trial to proceed, to which ruling of the court defendant then and there duly excepted. And it further transpired that when eight jurors had been selected, accepted, and sworn on the trial jury of said cause the names of all the forty-three jurors in the said box were exhausted, and the court thereupon ordered the marshal to summon bystanders to complete the panel, and the defendant thereupon renewed his objection above made and objected to the summoning of bystanders and the selecting of the balance of the trial jury therefrom, for the reason that having been served with a list of the jury drawn according to law he had a legal right to a trial by a jury selected from such list, and it was a denial of such right to excuse a third of said list and compel him to go to trial before a jury selected from bystanders; but the
77 court over'uled said objections and ordered the summoning of bystanders, from among whom four additional jurors to complete the jury were selected, to which ruling of the court defendant then and there duly excepted.

3rd. And afterwards, when the panel of jurors were being examined upon their voirdire, counsel for the Government asked each and every of the said jurors whether the fact that defendant brings his wife and child into court would in any wise influence their verdict, and whether the fact that he was a man of a family and had a wife and child would in any wise influence them in arriving at a verdict, to which the defendant excepted as improper, tending to create in the minds of the jury an impression that defendant would seek to obtain a verdict upon the ground of sympathy and not upon the merits, and for further reason that such fact was a proper one to be considered by the jury in arriving at their verdict and was not a ground of challenge; but the court over'uled said objections and permitted said questions to be asked, and allowed the same to be answered, to which ruling of the court the defendant then and there duly

excepted. And the juror, J. French, when examined upon his voirdire, stated that the fact that defendant had a wife and child would influence him in arriving at a verdict, whereupon said juror was challenged for cause by the Government. The court thereupon asked said juror the following questions:

Q. "You think you could not be governed solely and entirely by the evidence and render your verdict based upon that alone?"

To which the juror answered:

A. "Not under those circumstances; no, sir."

And the court propounded the following question:

Q. "You could not do it?"

A. "No, sir; I could not do it."

78 Defendant thereupon resisted said challenge, but the challenge was allowed by the court and the juror excused, to which ruling of the court the defendant then and there duly excepted.

And the juror, E. R. Jaeger, when being examined upon his voirdire, was questioned and made answers as follows:

Q. "Would the fact that this man has a family and brings his wife and child into court here in anywise tend to influence your verdict in this cause?"

A. "I am afraid it would."

Q. "You don't think you are strong enough to render a verdict according to the law and the testimony given you by the court without being influenced by the sympathy you feel for the wife and child?"

A. "I think it would certainly have some influence."

Q. By the court. "Do you mean to say it would have some influence—their presence—upon you individually as a man, or to say that it would have influence upon you as a juror in rendering your verdict?"

A. "It would have influence upon me as a juror, I think."

Q. By the court. "You believe that if you are called as a juror in this cause you could not render a fair and impartial verdict, based upon the law and the evidence in this case?"

A. "There are a whole lot of circumstances that would make it difficult, for I am a family man, but the sympathy I would have would be very strong; whether or not it would affect the verdict, I can not say."

Q. By the court. "Why do you conclude at this time that you could not render a fair and impartial verdict upon the law and the facts?"

A. "I have never been placed in a position like this before."

Q. By the court. "Your answer is not made with a view to being excused from jury duty?"

A. "No, sir."

79 Q. "By the COURT. Try and answer this question for me, and I will determine whether the challenge will be allowed or not. Do you believe, if called as a juryman in this case, you can render a fair and impartial verdict as based on the law and the evidence as the court shall give it to you and upon the law and evidence only?"

A. "I guess so."

Q. By the COURT. "You believe you can?"

A. "I think I can."

Q. By the COURT. "Do you believe that this sympathy which you may feel for the family of the defendant is such that if you are convinced

beyond a doubt from the evidence that the defendant was guilty that you would acquit?"

A. "No, sir; I do not."

Q. By the COURT. "Do you believe that it would affect your verdict at all—your sympathy?"

A. "Yes; what I meant to state, it would have an influence upon my verdict, but if the evidence was *a* such as to prove him guilty, I don't think the influence would be sufficient for me to acquit."

Q. By the COURT. "It would take stronger evidence for you to bring in a verdict of guilty than if he were a single man?"

A. "If he was a single man without a family."

Q. By the COURT. "Yes; but with a wife and child it would take stronger testimony if he did have a wife and child than it would if it was shown that he had no wife and child?"

A. "Yes; I think it would; that is, it would take stronger testimony for me to render the same verdict."

(The counsel for the Government thereupon challenged the said juror for cause, which said challenge was allowed by the court and said juror was excused, to which ruling of the court counsel for the defendant then and there duly excepted.)

80 4th. C. D. Shaw, having been sworn as a juror to answer as to his qualifications, was examined by counsel for the defendant as follows:

Q. "You heard this case stated, did you not?"

A. "Yes, sir."

Q. "Where do you reside?"

A. "Sitka."

Q. "What is your business there?"

A. "Laboring man."

Q. "How long have you resided at Sitka?"

A. "Almost two years."

Q. "Are you acquainted with General Friedrich?"

A. "Slightly."

Q. "Do you ever have any Government employment?"

A. "Yes, sir."

Q. "Do you know the defendant here?"

A. "Not until he came down; I saw him when he was brought down."

Q. "Do you know anything about the merits of this case?"

A. "No, sir."

Q. "Have you got any opinion now or any impression as to his guilt or innocence?"

A. "Yes, sir; I have."

Q. "Is it such an opinion or impression as would influence your verdict?"

A. "No, sir."

Q. "It is such an opinion or impression as would require some evidence to remove?"

A. "Yes, sir."

(Counsel for the defendant challenged the juror for cause, which challenge was resisted by counsel for the Government.)

Q. (By the COURT.) "Have you conversed with any persons who claimed to know the facts?"

81 A. "No, sir; I will state to the court what I know; I inquired into the case and wrote it for publication at the time Mr. Bird was brought down."

Q. (By the COURT.) "This inquiry did not extend to an examination of the witnesses or any person claiming to know the facts?"

A. "No, sir."

Q. (By the COURT.) "Just general talk."

A. "General talk and newspaper publications."

Q. (By the COURT.) "Did you form or express an opinion at that time as to the guilt or innocence of the defendant?"

A. "I don't think I expressed an opinion; I unavoidably have some opinion."

Q. (By the COURT.) "Is that an impression or an opinion."

A. "It is an impression."

Q. (By the COURT.) "Does it raise to the strength of an opinion?"

A. "No, sir; it does not."

Q. (By the COURT.) "Do you believe if called as a juror in this case that you could render a fair and impartial verdict in this case based upon the testimony that you hear here in court?"

A. "Yes, sir."

Q. (By the COURT.) "And not be influenced in the least by anything you may have heard?"

A. "No, sir."

Q. (By Mr. MALONY.) "You stated that you had an impression at this time?"

A. "Yes, sir."

Q. "Have you it at this time?"

A. "Yes, sir."

Q. "Is it such an impression as would require evidence to remove?"

A. "If the case develops as it seemed to at the time I inquired into it I have an opinion; of course, if the evidence proves that was not

82 the case I would be influenced entirely by the evidence."

Q. "You had an opinion at that time?"

A. "Yes, sir."

Q. "And it would require evidence to remove that?"

A. "Yes, sir."

Q. "In other words, your mind is not entirely clear; you have got an impression or opinion on your mind?"

A. "Yes, sir."

Q. "And such an opinion that it would require some evidence at least to remove?"

A. "Yes, sir."

Examination by COUNSEL FOR THE GOVERNMENT:

Q. "Notwithstanding whatever impression you may have had, if you was sworn as a juror in this case you would be governed exclusively and entirely by the evidence, and whatever opinion you may have formed would not have the slighest influence upon your verdict, and you would be governed by the evidence a'd the instructions of the court?"

A. "I would."

Q. (By the COURT.) "You believe you could do that."

A. "Yes, sir."

Q. (By the COURT.) "You think that the impression or opinion is not strong enough so that it would affect you?"

A. "I think it would not."

(Challenge denied by the court, to which ruling counsel for the defendant then and there duly excepted.)

C. W. Summers, being sworn as a juror, to answer as to his qualifications, was examined by counsel for the defendant as follows:

Q. "Have you heard of this case, the United States against Bird, indicted for murder?"

A. "Nothing except in a general way."

83 Q. "Did you read any newspaper accounts of it?"

A. "Yes; I read some time ago something about it."

Q. "At the time you read of this matter did it form any impression upon your mind or did you form any opinion?"

A. "No; no particular opinion one way or the other. There were no facts to justify an opinion."

Q. "Have you any opinion at this time in regard to the guilt or innocence of this defendant?"

A. "I have no opinion—that is, no conviction."

Q. "Have you any impression?"

A. "Well, no decided impression."

Q. "Have you any impression whatever?"

A. "Yes, sir; to a certain extent I have an impression."

Q. "Is you' mind at this time, Mr. Summers, clear and unbiased, without any bias concerning this defendant, either for or against him, and could you set as a juror and try this case impartially upon the evidence given by the witnesses and the law as given you by the court?"

A. "I think my duty would compel me to try the defendant fairly and impartially and judge the evidence. I don't think any impression I have formed would prejudice me against him or the case, one side or the other."

Q. "Have you a slight opinion?"

A. "Well, I have."

Q. "Is that such an opinion as would require some evidence to remove?"

A. "Yes, sir; I think so."

Q. "You think it would require evidence to remove that opinion?"

A. "Yes, sir; I think it would require some evidence."

Q. "Upon what is that impression or opinion founded?"

A. "The impression that I have is gained from being here in the court and hearing read the indictment to the prisoner and all the

84 circumstances."

Q. "Did you ever talk with the district attorney or his deputy, or any marshal or deputy marshals?"

A. "In reference to this case?"

Q. "Yes, sir."

A. "No; not at all."

Q. "Did you talk with anybody?"

A. "No; only merely mentioned the case—nothing about the facts that I remember of."

(Counsel for the defendant challenged the juror for cause, which challenge was resisted by counsel for the Government.)

Q. (By the COURT.) "Do you believe, if finally called and sworn as a juror in this case, nothwithstanding anything you may have heard read

concerning this affair, you could, after listening to the testimony and the instructions of the court, render a fair and impartial verdict in this case based upon the testimony and the law?"

A. "Well, I think, Judge, I could put aside any opinion I had; I think I could decide on the testimony."

Q. (By the COURT.) "You feel quite sure of that?"

A. "Yes, sir; I feel sure of that."

Q. (By the COURT.) "The impression you have had, has it been gained from conversation with anyone who purported to relate the facts, or witnesses in this case who claimed to be witnesses?"

A. "No; not at all."

Q. (By the COURT.) "You intimated that it was formed partially from what you heard in the court room. You was here the day he was arraigned?"

A. "Yes, sir."

Q. (By the COURT.) "That, in conjunction with the newspaper articles, is the basis of your present mental condition?"

A. "Yes, sir."

85 Q. (By the COURT.) "You believe, notwithstanding this opinion, you can render a fair and impartial verdict between the Government and the defendant based upon the testimony?"

A. "Yes, sir; I believe I could."

Q. (By Mr. MALONY.) "Did I understand you to say, Mr. Summers, you had formed an impression or opinion in regard as to his guilt or innocence?"

A. "Yes, sir."

Q. "Did I also understand you to say that it would require some evidence to remove that impression or opinion?"

A. "Well, I certainly have an opinion."

Q. "And it would require some evidence to remove it?"

A. "Yes; it would require some evidence to remove it."

Examination by counsel for the Government:

Q. "I understand you, Mr. Summers, that, notwithstanding this impression you say you have by reason of newspaper accounts and having heard what purported to be the facts in the case related in the indictment as it was read here when the defendant was arraigned, if selected as a juror in this case you would try the case and render a verdict strictly in accordance with the evidence as disclosed here and not based upon any impression or opinion you may have from hearing this matter discussed or spoken of?"

A. "I think I should judge the case from the evidence."

Q. "Just the same as though you had never heard of it, so far as being controlled by the testimony is concerned?"

A. "Well, I must certainly start in the case with a slight impression or opinion."

Q. "We understand that; but would you be governed by the evidence?"

A. "I think I could weigh it fairly."

86 Q. "And divest yourself from any influence of any opinion which you may have?"

A. "Yes, sir; I told Mr. Malony that I believed that impression could be removed. I doubt that impression is strong enough to effect my judgment of the evidence."

(The challenge to the juror is denied by the court, to which ruling counsel for the defendant then and there duly excepted.)

5th. That afterwards, when the jurors Henry Hall and Floyd Ryus were being examined upon their voirdire as to their qualifications as jurors, they stated that they served as jurors at the November, 1898, term of district court in and for the District of Alaska, but had not served as jurors since the said term; and were thereupon challenged by counsel for Government and r'sisted by defendant, but the court allowed said challenge and excused such jurors, to which ruling of the court defendant, by his counsel, then and there excepted.

6th. And afterwards, when the jurors D. Ledbetter, Geo. Walker, M. Raber, and H. Patterson were being examined upon their voirdire, they stated that they had served as jurors in the United States district court in and for Alaska within one year next preceding the beginning of this term; that such service was not upon any regular panel, but that they had each served as talesmen on one particular case each; that they had not served upon any regular panel within said time, but had only served as a talesman, whereupon counsel for Government challenged such juror for cause, which challenge was resisted by the defendant, and the court sustained said challenge and excused said juror, to which ruling of the court the defendant then and there excepted.

7th. That afterwards, when the juror C. L. Parish was being examined upon his voirdire, he said that he had not served at any term of the district court for Alaska as a juryman upon a regular panel within
87 one year next before the convening of this term of the court; that his last service as a juryman was at the fall term of this court in 1898, less than one year ago, and that his service then was not upon a regular panel, but was as a talesman. Counsel for the Government thereupon challenged said juror for cause, which said challenge was resisted by the defendant, and the court sustained said challenge and excused said juror, to which ruling of the court defendant, by his counsel, then and there excepted.

8th. And afterwards, when a jury of twelve, before whom defendant was to be tried, had been completed in the manner aforesaid, defendant challenged the array of said jury upon the following grounds, to wit:

1st. That said jury had not been impaneled as required by law. 2nd. That the list of jurors served upon the defendant by the attorney for the Government does not correspond with the number of jurors in the box and with the list of jurors named by the clerk, and that the whole panel has been called and formed contrary to law; which objection and challenge was by the court overruled, and to which ruling of the court defendant then and there duly excepted.

9th. And the plaintiff, to maintain the issues on its part, introduced the testimony of Charles Sheffler, which tended to prove the following state of facts:

Witness was a resident of the city of New Orleans, Louisiana; knew the defendant; first met him in March, 1898, in the city of New Orleans; met him under the following circumstances: R. L. Patterson had advertised for some person with means to join an expedition to the Yukon

River to prospect for gold; among others who answered the advertisement was the defendant Bird. Neither witness, R. L. Patterson, or the deceased J. H. Hurlin had never met Bird prior to that time as he knew of; after discussing the proposed trip and estimating the costs, it was understood that about two thousand dollars would be required.

88 Witness, Patterson, Hurlin, and the defendant Bird each agreed to furnish $500 in money. Witness had no money and was going to get a friend to put up his part. This friend failed and witness put up no money whatever. Deceased Hurlin furnished something over $500 and the deceased Patterson furnished something over $400, and the defendant Bird furnished about $1,000. Witness and Hurlin left New Orleans in the month of April, 1898, for San Francisco; were there some time making preparations and preparing outfit. About a week before they sailed, defendant Bird, Patterson, and a woman by the name of Naomi Strong joined the party. Besides their provisions, which were expected to last about 18 months or two years, they had procured a small steam launch about 19 feet long, and a scow about 32 feet in length, 7-foot beam, 3 feet deep. Party sailed from San Francisco, May 21st, 1898, on the "Rufus E. Wood," for St. Michaels; reached St. Michaels in July; about a week thereafter started up the Yukon River in the small launch and barge towed by the same launch. In September sometime reached a point on the Yukon River about 85 miles above Anvik and about two miles below the coal mine known as Fort Dewey. Here the party went into winter quarters. About the 24th of September, witness, Hurlin, and Patterson determined to leave defendant and Naomi Strong. Defendant and Naomi Strong while on board the "Rufus E. Wood" had passed under the name of Mr. and Mrs. Burdick, and Naomi Strong and R. L. Patterson had passed as brother and sister. They all three occupied the same stateroom. On the way up the river the party slept on a scow. The provisions and outfit were carried in the scow, provisions being packed about three feet deep, from a point about four feet forward on the stern and filling the whole space thence forward to a point near the bow, as indicated in the plats produced in evidence, the top of

89 the pile of provisions being level. Defendant and Naomi Strong occupied the same bed, which was made down on top of the provisions on *on* the right-hand side looking forward toward the head of the boat. Near the rear end and on the pile of the provisions just opposite and on the other side of the scow, made down in the same way, was Patterson's bed. There was just space sufficcient to walk between. The witness and Hurlin had their beds made down across the scow, near the forward end of the pile of provisions. In the stern of the *of the* boat was a seat upon one end of which was a cooking stove where the cooking for party was done; between the seat and the sacks and boxes containing the provisions, which were packed in the manner aforesaid, was a vacant space about two or two and one-half feet wide. In the right-hand end of this space looking forward was a water barrel, ordinary size. The end of this pile of provisions was used as a seat, and on this seat on *on* the right-hand side next to the water barrel was a box used for the purpose of keeping the knives, forks, and dishes, etc., commonly called the grub box. This box was about two feet in length.

On or about the 24th day of September, 1898, the witness, Hurlin, and Patterson determined to separate from the defendant Bird and Naomi Strong, because the relations between them had become so disagreeable. Bird was informed of this, and assented to it, but asked them to help him finish the cabin they had started in to erect for winter quarters. This they agreed to do. The cabin was finished about the 26th. In the meantime there had been a disagreement with reference to a division of the outfit. Witness had nothing to do with this, as he had no money invested in it. Hurlin and Patterson wished three-fifths of the provisions, as there would be three in their party, and to leave the defendant two-fifths for himself and Naomi Strong. The defendant was dissatisfied with this, claiming that he had put in one-half for the goods and
90 was entitled to keep one-half of them, and offered to call in the coal miners from Fort Dewey and leave it to arbitration. This Hurlin and Patterson refused. On the morning of Sept. 27th, 1898, defendant rose early, drank some coffee, and went up to the cabin on the hill about 200 feet away from the river bank. The boats were moored to the river bank in the manner indicated in the diagrams introduced in evidence. About eight or nine o'clock witness was sent by Hurlin and Patterson to call the defendant to come down to the boat, as they wanted to divide the provisions. Witness went up to the cabin and called the defendant to come down. He replied that he would be down directly, and witness returned to the boat. In the meantime Naomi Strong, who was doing the cooking for the party, announced that breakfast was ready, and about that time defendant came down and went into the boat. The witness, Hurlin, and Patterson sat down on the seat at the end of the pile of provisions, facing towards the stern of the boat. Hurlin was seated on the left-hand side, next to the grub box, witness in the center, and Patterson on his right, next to the side of the boat, all facing towards the stern. Bird was seated on his bed, immediately in the rear of Hurlin and from four to six feet distant from him. Naomi Strong asked Bird to come down and have some breakfast. He replied that he would take his breakfast up where he was. Their breakfast consisted of oatmeal in galvanized plates, and was then handed out to them. There was no table and they ate from their laps. Witness suddenly saw Naomi Strong make a frightful face, as though very much frightened, and immediately a shot rang out and Hurlin's head sank over. Witness started to rise and Patterson also started to rise, and when they were about half up, in a half-rising position, another shot rang out almost immediately following
91 the first, and witness felt Patterson's left arm jump against his, the witness's, side. Patterson immediately sprang overboard from the stern of the boat. Witness turned and saw Bird standing on his bed with the shotgun in his hand, which he immediately recharged from cartridges he was holding in his mouth. Bird then presented the gun at witness, but witness caught his eye and asked him not to shoot. Patterson jumped overboard from the stern of the boat towards the water side, at the place marked with a circle on the diagram. Bird went outside on the shore and immediately shot at Patterson again while he was in the water. "That is, I could not see it, but I heard the splash following the report of the gun, and Patterson was begging the defendant not to shoot him, and the defendant was cursing him." The place where the

defendant was when this was going on is marked circle with a cross in the diagram. Witness could not remember all that Patterson said, but he begged him not to shoot for his family's sake and such like. After the second shot at Patterson, defendant told Patterson to come out of the water, which he did. Defendant then called witness out of the boat and told him to come and help his friend. Witness went out. Defendant then got on the bow of the boat and stayed there. At that time the defendant had the shotgun and rifle and told witness not to come near him as he didn't trust him. During that time the woman came over, crying, and the defendant stepped back into the boat and threw out a blanket for Patterson to lie on. Patterson was begging, "for God's sake, take me to the cabin," and about that time the defendant stepped down and shook hands with Patterson and said, "I am sorry I did this." Witness did not remember exactly what he said. Witness and defendant then took Patterson up to the cabin, assisting him to walk. Patterson was wounded in the left shoulder, the wounds extending from
92 about the lower point of the left shoulder blade, coming out near the top of the shoulder, and one shot entered under the left jaw and came out through the mouth, knocking out two teeth; and another shot came out under the right eye. At the cabin defendant and witness dressed the wounds; defendant and Naomi Strong then went back to the boat, and witness stayed at the cabin with Patterson. Witness never saw Hurlin again after leaving the boat. He was shot through the head, the shot entering a little to the rear of the left ear, and was instantly killed. Besides the shotgun there were two rifles on the boat, one belonging to witness and the other to Hurlin, the deceased. Witness's rifle was in the bow of the boat and was loaded. Witness never reported the killing to anyone because of his fear of the defendant. Defendant kept him unarmed about two weeks after the killing. After the shooting defendant and Patterson became very friendly, and witness did not trust any of them. Witness did tell the miner John Tompkins, who lived about a mile up the river from their camp, something about it, but was afraid Tompkins was standing in with defendant. Tompkins and Jensen, the miners from Fort Dewey, came down the next day after the shooting. Sometime after that there was a party of that eight armed men there together, and one of them asked after Hurlin, and witness and Naomi Strong told them that he, Hurlin, had gone down the river. Bird had told them to say that. About two weeks after the shooting witness and Bird were down to Blackburn, a trading post about fifteen miles down the river, for medicine for Patterson, and took dinner there. In March, 1899, witness and Naomi Strong made up a scheme to get Bird down to Blackburn to have him arrested, as follows: Mr. Black, who kept the trading post at Blackburn, was to invite them down to dinner,
93 and she was to accept. Bird did go down with them, and was arrested by Mr. Black and kept tied until the officers came from St. Michael for him sometime in April. Before that, early in March, Mr. Chapman and Mr. Blain had come up from Anvik and taken Mr. Patterson down to the Mission there for treatment. On cross-examination, witness denied that on the day following the shooting, Bird, the defendant, wished to give himself up to the miners and be taken to St. Michaels to answer for the killing, and was dissuaded from so doing by witness, Naomi Strong, and Patterson.

And to further maintain the issues on their part the plaintiff introduced the witness Naomi Strong, whose testimony tended to prove the following state of facts: Witness was born in Indianna; went to New Orleans about 1892; had been married; met Bird in 1893 or 1894; shortly after meeting him began illicit relations with him, which continued up to the time of the defendant's arrest for this offence for which he is being tried. The witness' testimony concerning the departure of the party from New Orleans and up to the time they reached winter quarters on the Yukon River substantially the same as witness Scheffler, and her description of the scow or boat in which the shooting occur'ed substantially the same. Continuing her testimony as to the events on the 27th day of September, 1898, witness testified that when she called the men to breakfast Hurlin, Patterson, and Scheffler came into the boat first and sat down on the rear end of the pile of provisions, facing the stern of the boat, with their feet in the vacant space between the stern of the boat and the provisions. Hurlin was sitting next to the grub box, Scheffler in the middle, and Patterson at the other end, next to the side of the boat. The three men were crowded in very close. Wit-
94 ness was sitting immediately in front of Mr. Hurlin. She had asked Bird to come down and have some breakfast, but he said he would eat breakfast where he was, which was on his bed, about six feet in the rear of Hurlin. Witness had just dished out some oatmeal and they had started to eating it. We didn't have room for a table; they were eating it in their laps in little tin plates. So I heard Mr. Bird's gun click, like one was going to break it open or close it, and when I heard Mr. Bird's gun I looked up and I saw him raise up. I didn't see the gun, and I didn't like the look on his face, but I didn't pay any attention until I heard the gun, and I looked up and saw Mr. Bird standing there with his gun in his hand closing it, and I looked at him, and Mr. Scheffler saw me looking and he turned round, and then Bird he said, "Now, you Dutch sons of bitches, I have got you," and he shot Hurlin, shot him back of the left ear, and Mr. Scheffler jumped up and said, "For God's sake don't shoot me," and he was facing Homer, the defendant, and Mr. Patterson jumped behind me, and I jumped and ran, and as I passed the defendant he fired at Mr. Patterson, and then Mr. Patterson jumped overboard, and I climbed out on the beach, and Mr. Patterson, after he jumped overboard, walked around on the right side of the boat, and Mr. Bird ran and headed him off at the bow of the boat, and Mr. Patterson was begging for the defendant not to shoot him. He said. "Homer, for God's sake don't shoot me any more." And Homer said, "Don't you come up to me or I will shoot you." He was walking, begging for Homer not to shoot him, and all at once Bird said, "Bob, you dirty son of a bitch, you are the cause of all this," and he shot at him again and missed him, and in the meantime he put the gun down in the bow of the boat, and Mr. Patterson crawled on the bank and sank down, and I was on the beach crying, and Mr. Patterson saw me and
95 said, "Naomi, have mercy on me." And then Mr. Patterson held out his hand to Mr. Bird, and when Mr. Patterson held out his hand to Mr. Bird, Mr. Bird told me to take hold of Bob, and I went up to Mr. Patterson and took his hand, and I said, "Where is Hurlin?" And he, defendant, said he is dead. And I said I couldn't take care of

Mr. Patterson. His face was all bloody. And I asked defendant where Scheffler was, and defendant called to Scheffler to come out and help me. And I said to defendant, "Don't shoot Charley," and he said, "I am not going to schoot Charley." And I stepped up to him and I said to defendant, "Don't shoot Charley." And Patterson held out his hand to Mr. Bird again and told him to shake hands, and said, "Homer, shake hands with me," and Patterson and defendant shook hands. And Patterson said, "Homer, spare my life, think of my poor family," and defendant said, "Bob, I have thought of both our families." And Patterson looked up into defendant's face and said, "Homer, I wouldn't hurt a hair of your head." And Mr. Scheffler stood at the back of Mr. Patterson, and I went and took hold of Mr. Patterson's arm and I saw where he was shot in the back, and I said, "I can't do it." And he said, "You carry the guns and I will help Charley up with him." And he made me carry both the guns, his shotgun and Mr. Scheffler's rifle. Defendant and Scheffler assisted Patterson up to the cabin and Mr. Scheffler sent the witness down to the boat for a satchel containing some medicine. Witness took them up and gave them to Mr. Sscheffler and went back to the boat. Defendant then compelled witness to assist him in burying Hurlin. Witness was greatly excited at the time, because as she approached the boat she heard Hurlin's body fall over from the sitting position in which he had remained when shot. Hurlin was buried by d'fendant and witness on the bank of the Yukon, below high-water mark. On cross-examination witness said that she had never
96 reported to anyone about the killing of Hurlin through fear of the defendant. She f/rther testified that on the next day John Tompkins and Jensen came down from Fort Dewey to get some provisions, and when they were seen approaching defendant said he was going to surrender to them and let them take him to St. Michaels, but witness, Scheffler, and Patterson urged and persuaded him not to do so. Witness further said that Strong was her maiden name, it was not her husband's name, and refused to give the name of the man to whom she was married.

And the defendant, to maintain the issues upon his part, testified in his own behalf, tending to prove the following state of facts: That he had been imposed upon by the deceased Hurlin, Patterson, and the witness Scheffler in the matter of furnishing money for their contemplated journey to the Yukon in the early part of 1898; that they were each to put up $500.00, but that he expected to take considerable more money than his part with him to pay for things along, including Scheffler's fare of $165.00, expecting and intending to have a settlement at the earliest opportunity; that he learned, while on board the "Rufus E. Wood" on the way to St. Michaels, that Scheffler had furnished nothing; that he, the defendant, put up $1,000.00, and Hurlin and Patterson, between them, about $980; that he was dissatisfied with this, but there was no serious quarrel or dissagreement of any moment on the way up the Yukon to where they went into winter quarters, except such bickerings and vexations as were incident to such a trip; that about the 20th or 22nd of September Patterson, Hurlin, and Scheffler decided to leave him and Naomi Strong and cut wood for the steamboats that would be passing in the spring. Defendant asked them to remain and help finish the cabin, which they

did. Scheffler, Hurlin, and Patterson wanted to take three-fifths of the provisions, which the defendant was unwilling for them to do, and
97 proposed to arb'trate it, but they refused. This was several days before the shooting, but there was nothing more said about it until the morning of the shooting. The night before the shooting defendant and Naomi Strong went up the hill above the river to look for a beam 24 feet long, and on that occasion Naomi Strong told defendant that they were going to take the provisions and go off by themselves, and defendant said, "Let them go;" and when they reached the cabin Naomi Strong told the defendant that they were down there loading their guns, and "If you don't let them have the provisions, there is going to be trouble." When defend' returned to the boat that night, Hurlin, Patterson, and Scheffler had gone to bed, and nothing was said. The next morning—morning of the 27th—Hurlin and Scheffler got up first, made the coffee, and started up into the woods towards the cabin; and defendant got up then and got his coffee and gave Naomi her coffee, and Patterson lay in bed, and defendant started for the cabin. Defendant must have been up there about an hour when Scheffler came up and said that Patterson said come down and divide the provisions. Scheffler went down ahead of the defendant, and defendant told him he would be down in a minute. Defendant went down in a little while, and Patterson was on the outside, on the bank, where he had got a lot of brush and laid it out on the bank to put the provisions on. Defendant don't remember what Hurlin was doing. Defendant walked into the boat, and Naomi called them in for breakfast. "We all went into the boat and had breakfast." Defendant here testified from defendant's Exhibit No. 1, and testified that Patterson and Hurlin sat, while eating breakfast, at the place marked "P" and "H," and that the place marked "Bird" was the bed usually occupied by defendant and Mrs. Strong, and the place marked "Patterson's bed" was the place
98 where Patterson slept, and *and* Sdheffler and Hurlin slept in the place marked on the plat "Scheffler and Hurlin." Defendant also described the manner that the provisions were stored in the boat and beds made down on top thereof, and the seat in the stern and the end of the pile of provisions being used for a seat, substantially the same as was done by the other witnesses. Defendant further testified that the place marked "B" was the water barrel. During breakfast defendant testified that nothing of any moment occurred. After breakfast Scheffler and Naomi Strong began washing up the dishes in the stern of the boat. Defendant was sitting upon his bed, and Hurlin and Patterson sat down upon the space marked "Patterson's bed." Hurlin got out his bills and defendant got out his bills and began to cast up what each had paid out, and we began jawing. They wanted to divide the provisions in five equal shares, and defendant told them that he did not think that they were entitled to have them divided into five equal shares; that Scheffler had paid out no money. And they said that Scheffler had worked all the way; he ought to be entitled to his provisions; and defendant replied that he had worked as hard as Scheffler had, and proposed to get John Tompkins, the coal miner, and let him make the division. But Hurlin and Patterson would not agree to that, and said that they would divide the provisions to suit them, and the defendant replied: "No, you won't. You want to beat me out of my money I put up." And Patterson said, "You are a

damn liar," and struck me in the face. Thereupon defendant hit Patterson in the eye. At that moment Naomi cried out, "Homer, look out; they are going for their guns." And I ran and got my gun, which was standing behind the water barrel in the stern of the boat, which was the usual place where it was kept, as it was convenient to shoot ducks
99 with going up the river. When I got my gun, Hurlin was getting his gun, which was under his sleeping bag, and he was in a stooping position, with his face towards the left side of the boat, raising up with the gun in his hand, and defendant shot him; and Hurlin fell over in front of the pile of provisions, falling across his gun, and in the fall he broke the stock of it. I then looked and saw Patterson pass up from under the canvass cover that was over the boat towards the gun that was standing in the bow, and I shot him with the other barrel. My object in shooting Patterson was because I thought he was making for his gun. My attention was called to them by Naomi Strong. Hurlin was shot in the side of the face, on the left side, and Patterson was struck in the shoulder—in the left shoulder. Patterson ran out of the bow of the boat onto the shore. He never was in the water at all, and I never fired at him except the one time. Defendant went out of the boat following Patterson, and Patterson asked him not to shoot him, but to shake hands with him; and Patterson said, "Homer, I am sorry I didn't tell you about this this morning before it happened." Naomi Strong and Scheffler were both present, and *and* Scheffler said that they wanted him to take a hand in it and that he wouldn't do it.

And this was all the testimony on behalf of the defendant relating to the circumstances of the killing and the provocation that lead up to it.

10th. And to further maintain the issues on its part, the *the* plaintiffs elicited from the witness Charles Scheffler, a witness in behalf of the Government, the following testimony, to wit: That in the month of August, when the defendant, in company with the deceased Hurlin, R. L. Patterson, Naomi Strong, and witness, were going up the Yukon River in a steam launch, towing a barge loaded with their provisions,
100 Hurlin was steering; that the defendant was very disagreeable to all the other persons; that when they would run into a sand bar he would curse them; he would say: "The Dutch sons of bitches don't know where to run it." On one occasion they were getting wood on the bank of the river, and Bird got out and *and* wanted to hit Patterson. Witness didn't remember exactly what was said, but defendant called Patterson a "son of a bitch," and told him he would "hammer the devil out of him," and witness and the others would not let them fight. And if anything would go wrong, he, defendant, would not curse in front of witness and *and* the others' faces, but defendant would be disagreeable all the way along, and would make things very disagreeable; to all which testimony counsel for the defendant, by his counsel, objected, for the reason that it was immaterial and irrelevant, and to' remote from the time the offense is charged to have been commmitt/ed, which objection was by the court over'uled, and said testimony permitted to go to the jury, to which ruling of the court defendant then and there excepted.

11th. And the Government, to maintain the issues on its part, by its counsel, asked the witness Charles Scheffler the following question, to wit:

"Q. State whether or not, during your trip from St. Michaels to the

place where you finally went into winter quarters, the conduct of this defendant towards all the rest of the party was domineering and he manifested a high temper."

To which question defendant, by his counsel, objected, because the same is leading, and suggestive, and improper, and calling for a conclusion of the witness; which objection was by the court sustained. Counsel for the Government thereupon asked the witness the following question:

Q. State generally what was the bearing and conduct of this
101 defendant towards the party from the time you left St. Michaels until the time you went into winter quarters." To which question defendant, by his counsel, objected, because leading and suggestive, calling for a conclusion of the witness, and for the further reason that the Government's counsel has just asked a question highly leading and suggestive of the answer desired, to which the court sustained an objection, and by allowing the above question seeking the same testimony as was sought by the question excluded the Government's counsel is in effect leading the witness; but the court over'uled said objection, to which the defendant, by his counsel, then and there duly excepted. And the witness answered that the defendant would at times be friendly, and then he would be very disagreeable; that he abused the woman once that he knew of.

12. Be it remembered that after the witness Charles Scheffler had testified that on the morning of September 27th, 1898, the defendant, Bird, shot the deceased, Hurlin, with a double-barrelled shotgun through the head, killing him, which shooting took place on the Yukon River and within a boat or scow moored to the banks of the river; that he immediately, with the other barrel, shot and wounded one R. L. Patterson; that Patterson afterwards jumped overboard from the rear of said scow and that Bird, the defendant, thereupon left the scow and went out upon the bank of said river, and standing upon the bank with his gun recharged he again fired at R. L. Patterson while he was in the water. That Patterson begged the defendant not to shoot him and the defendant began to curse and swear at him, Witness could not tell exactly what was said, but Patterson begged defendant not to shoot him for his family's sake and for his child, and all like that, and the defendant cursed him, and *and* said "God damn you, you are the cause of all of it," and *and*
shot at Patterson again with the shotgun. Witness could hear the
102 splash of the water when the shot was fired. The defendant then called Patterson out, but Patterson kept on begging him not to shoot him, and all that sort of thing, and the defendant told him to come out, that he wouldn't hurt him, and Patterson came out of the water and walked up to the defendant and fell down. Defendant then called witness out of the scow and said, "Come out here and help your friend," and witnes' went out on the bank and defendant got into the bow of the boat or scow. At that time he had a shotgun and rifle. Defendant got a blanket and threw it out for Patterson to lay on, and Patterson was begging him for God's sake to take him to the cabin, and the defendant stooped down about that time and shook hands with Patterson and said he was sorry he did that. Witness didn't remember exactly what was said, and the woman was standing around there crying. The defendant told her to shut up, but she said she couldn't help it. You could see the hole in Patterson's shoulder where he was shot, and he, defendant, took one side of Patterson and witness took the other side and they led him down the

river bank, then up the hill to the cabin. And witness staid there with Patterson, and the woman, Naomi Strong, remained in the boat. To all which testimony as *as* to the shooting of Patterson when he was in the water and *and* all that part of it as to what occurred on the bank of the river afterwards the defendant objected because immaterial and
103 incompetent, and calculated to prejudice the jury against him; but the court overruled said objections and allowed said testimony to go to the jury, to which ruling of the court the defendant then and there excepted.

13th. Counsel for the Government also offered the following testimony of the witness Charles Scheffler: That the reason witness did not take occassion to tell the condition of affairs at their cabin on the evening after the killing of Hurlin and the shooting of Patterson was that the defendant was watching him all the time and that he couldn't do it; that Patterson was holding secret conversations with defendant and witness could not rely upon Patterson and couldn't trust the woman, Naomi Strong, and didn't know what to do; that at the time he took Patterson up to the cabin witness told him "Bob, I am going to get help," and Patterson said, "that man will finish killing me," and witness "promised to stick by him." This was not in defendant's presence, but it was the first they took him up to the cabin. Patterson told witness not to go, and that he wanted witness to stay with him. And to all that part of the testimony as to the conversation between the witness and said Patterson in the absence of the defendant the defendant, by his counsel, objected, because incompetent, irrelevant, and immaterial; but the court overruled said objections and allowed said testimony to go to the jury, to which ruling of the court the defendant then and there duly excepted.

14th. Afterwards the Government, to maintain the issues on its part, offerred the following testimony of the witness Scheffler: That in the latter part of March, 1899, after Patterson had been carried to Anvick, Bird made a trip up the river and came back with a man by the name of Smith; that Smith left and the next day after that Bird was very disagreeable and tried to pick a fight with the woman, Naomi Strong; he acted very funny, you had to watch him and be careful. He got awful
104 good after that and everything was just so. It was "Charles this," and "Naomi this." To which testimony defendant, by his counsel, objected, because irrelevant, incompetent, and immaterial, and calculated to prejudice the jury; but the court overruled said objections and allowed said testimony to go the jury. To which ruling of the court the defendant then and there duly excepted.

15th. On cross-examination, the witness Charles Scheffler, and after he testified that after the killing of the deceased, Hurlin, by the defendant, he distrusted the witness Naomi Strong, and that the reason that he would not trust her was that she was with Bird, the defendant, and that was the reason, among others, why he was afraid to tell anyone of the commission of the alleged crime, the defendant, by his counsel, asked said witness whether or not he trusted said witness, Naomi Strong, now, expecting to show such relations between said parties as would lead both said witnesses to have a strong motive to *to* secure the conviction of the defendant in this case; but the counsel for the Government objected to the question propounded, for the reason that it was incompetent, irrele-

vant, and immaterial, and not proper cross-examination; which objection was, by the court, sustained, and the witness not permitted to answer said question; to which ruling of the court the defendant then and there duly excepted.

16th. And afterwards when the Government called the witness Naomi Strong to testify in behalf of the Government against the defendant, the following proceedings were had, to wit: The jury being withdrawn at the request of the defendant, by his counsel, the said witness was asked if she had not been married to the defendant, Bird, and she denied that she had ever been so married. Defendant, by his counsel,
105 thereupon read the motion and affidavit which is shown in the record, in which the court was asked for process to search the trunk of the witness Naomi Strong, then in charge of the marshal, upon the ground that defendant could thereby procure the marriage certificate of defendant and witness, whereby the witness would be shown to be incompetent to testify; which motion was, by the court, overruled and denied; and afterwards, when the witness did testify and was being cross-examined, she was asked by counsel for defendant, after having admitted that she had been married, to give her married name, which the witness refused to do; and defendant, by his counsel, thereupon requested the court to compel the witness to answer, but the court declined to do so; to which ruling of the court defendant then and there duly excepted.

17th. And afterwards when the witness Wallace Blain was called by the Government and testified in the case, the following proceedings were had and done: The counsel for the Government asked the witness to detail the conversation between witness and defendant, wherein the defendant was alleged to have made an admission or confession of the crime charged, and thereupon the following proceedings were had, to wit: The witness, on being examined as to whether or not the defendant had made such admissions under duress or fear, or under the influence of threats, said, in substance, that no such threats or inducements were held out by witness himself, the said witness being a deputy marshal, sent from St. Michael to arrest the defendant. Witness further said that he knew by hearsay that previous to the conversation called for threats and intimidation had been used to induce the defendant to make a statement; that he knew by hearsay that defendant had been threatened in order to make him make a statement as to the circumstances of the alleged crime.
106 In witness's presence no persons made any threats or held out any inducements. Witness was the deputy marshal sent to arrest the defendant from St. Michaels. The threats had been made perhaps a week before his arrival on the Yukon, where defendant was. Defendant, before making the statement to witness, did not tell witness that he was being threatened. At that time, and in the conversation then had between witness and defendant, there was no threat or any inducement held out for defendant to make the statement to witness. The facts were, as witness learned, that when defendant was arrested by Mr. Black, about a week prior thereto, defendant began to cry and broke down, and wanted to know if they were going to hang him, and was told that they were going to hold him there and turn him over to the proper authorities, and they asked him if he would go out and show

them where Hurlin was buried, and he agreed to do so if they would protect him from any mob that might come before the authorities came, and they—that is, Black and others—promised to protect him, and the defendant told me that he had promised to go up and show where he had buried Hurlin, and that he had killed Hurlin and also shot Patterson. That is just as I remember it. The first thing defendant said was, he asked, "Are you going to hang me?" and he asked if they would protect him from the mob and they agreed to do so. And the defendant, by his counsel, thereupon objected to any testimony as to the alleged admission or confession by the defendant to said witness, Blain, because defendant, it appeared, made such admissions and confessions under the influence of fear and duress, and because of the promise of protection inducing such admissions to be made; but the court overruled such objections and allowed said admissions to be testified to and go as evidence to the jury; to which ruling of the court defendant then and there duly excepted; and thereupon the witness testified before the jury as follows: Witness asked defendant, "What did you kill Hurlin for, anyway?" and defendant said, "I had to kill him." And wit-
107 ness asked him, "Did you kill him in self-defense?" and defendant answered, "No; I didn't in self-defense, but I had to kill him or he would have killed me." Then he broke down at that and started to cry and said something about his wife and child; and when he spoke about his wife and child, I said, "Think of Patterson's poor wife and child at *at* home," and defendant's says, "Is Patterson dead?" and witnes' answered, "Yes," and defendant says, "I am going to hell now, sure." And defendant asked, "When did he [Patterson] die?" and witness told him, and defendant says, "My God, Patterson was my friend. Bob [meaning Patterson] was a K. P. I didn't know it when I shot him, though." And he broke down and cried again. Then he said, "The woman is all right; she will stay with me, but that Scheffler will swear my life away." And in the conversation he said, "I wish I had killed that Dutch son of a bitch." To all which testimony defendant, by his counsel, objected, because the same was obtained under fear and was induced by promises of protection from mob violence; but the court overruled said objection and allowed said testimony to go in evidence before the jury; to which ruling of the court defendant, by his counsel, then and there duly excepted.

18th. And afterwards the witnesses for the Government, Wallace Blain and Vawter, testified that on the first day of Oct., 1899, the defendant Bird escaped from the jail at St. Michaels, where he was then confined, by cutting a hole through the floor of his cell, and was shortly afterwards recaptured, to which testimony the defendant by his counsel objected, because irrelevant, incompetent, and immaterial, tending to prejudice the jury against him; but the court over'uled said objection and allowed said testimony to go in evidence to the jury, to which ruling of the court defendant then and there duly excepted.

19th. Afterward' the defendant offered to show by the witness,
108 Mrs. Van Horn, who had been acquainted with the defendant for a number of years at his home in New Orleans, La., that defendant was a member of the New Orleans Board of Exchange. Counsel for the Government objected to the testimony for the reason that the same was irrelevant, incompetent, and immaterial, and the court, ruling upon

said objection, said: "A man might be a member of the Board of Trade of New York and yet might be the biggest scoundrel in New York City. The objection is sustained, for the reason that it does not tend to show either the character or standing of the defendant or his reputation for peace and quietude or truth and veracity." To which ruling of the court defendant then and there duly excepted.

20th. And afterwards when the witness' for the prosecution, to wit, Mrs. Naomi Strong and Charles Scheffler, had testified that the defendant, at the time he is charged with having shot and killed the deceased, and also shot and wounded R. L. Patterson in the left shoulder with the same gun, to wit, a No. 12 shotgun, charged with BB or buckshot, and that at the time of said shooting the deceased Hurlin and Patterson were sitting at a distance not exceeding six feet from where the defendant was standing at the moment of the shooting, and that the wound made upon the said R. L. Patterson was substantially as follows: Some of the shot entered at the lower point of the left shoulder blade and came out near the top of the shoulder, and some of the shot entered under the left jaw and came out through the mouth, and one came out under the right eye. Defendant then requested that the jury, in charge of some proper officer, be taken out to some suitable place and allowed to witness a discharge from a 12-bore shotgun, loaded with shot similar to that described by the witnesses, for the purpose of showing the degree that shot will
109 scatter at the distance testified to by witnesses for the prosecution, it being expected to show that it was physically impossible for a wound testified to by said witnesses to have been inflicted at the distance described by them, and to corroborate the testimony of the defendant as to the manner of the shooting; but the court denied said request and refused to permit the jury to witness a discharge of a shotgun at all, to which ruling of the court the defendant then and there duly excepted.

21st. Afterwards, and after the defendant had testified in his own behalf that immediately after the shooting of Hurlin and Patterson, the witness said Charles Scheffler said to the defendant that prior to the difficulty in which the said Hurlin was killed and Patterson shot and wounded, wanted him, the said Scheffler, to join in the trouble, and he refused. The Government recalled the witness Charles Scheffler in rebuttal, and asked him if he made such a statement, and the witnes' testified that he did make such a statement. Counsel for the Government thereupon asked the witness: "Now, then, explain why you came to make it." Defendant, by his counsel, objected to the question and the testimony sought to be elicited thereby, for the reason that it was irrelevant and immaterial, the witness's private reasons therefor not being material to any issue in the case, but the court over'uled said objections and permitted the witness to give the reasons for making said statement, to which ruling of the court defendant then and there excepted; and the witness thereupon testified in substance that he made said statement because he feared defendant, and that everything he said to him had to be "yes" to him, and that the statement was untrue that the deceased Hurlin and Patterson never made any such request.

22nd. And after the close of the testimony and in his closing argument to the jury counsel for the Government stated and argued
110 to the jury in substance as follows: That the *that the* defendant by his counsel were saving exceptions to the action of the court

and availing himself of every technicality in the hope of securing a reversal of the case by the Supreme Court; that they placed their reliance there and not upon an acquittal upon the merits, and were attempting to make a record to reverse the judgment of this court in the Supreme Court. The defendant, by his counsel, objected to such argument as being improper and calculated to mislead the jury and prejudice their minds against him, and requested the court to not allow such line of argument to proceed; but the court refused to stop such a line of argument, to which action of the court the defendant then and there excepted.

23rd. And thereupon the court gave, at the request of the Government, among others, the following instructions, to wit: "The court instructs the jury that if they believe from the evidence beyond a reasonable doubt that the defendant Bird, on the 27th day of Sept., 1898, at a point on the Yukon River about two miles below the coal mine known as Camp Dewey, and about 85 miles above Anvik, and within the district of Alaska, shot and killed one J. H. Hurlin, and that said killing was malicious, premeditated, and willful, and that said killing was not in the necessary defense of the defendant's life or to prevent the infliction upon him of great bodily harm, then it is your duty to find the defendant guilty as charged in the indictment."

To which instruction the defendant then and there excepted, for the reason that the same is erroneous because not qualified by the further charge that if the defendant believed, and had reason to believe, that the killing was necessary for the defense of his life and to prevent the infliction upon him of great bodily harm, then he was not guilty.

24th. And the court further instructed the jury, among other things, as follows, to wit:

111 "That as in this case, where it is claimed by the defendant that up to the time of the killing of deceased there had been no previous quarrel or difficulty, but that the relations had been friendly and amicable, but that in the discussion between defendant, deceased, and one Patterson of a business matter, a quarrel suddenly sprung up between Patterson and defendant, and defendant struck Patterson in the face after first having been hit by Patterson in the side; that thereupon Patterson started to run away and deceased started in another direction, but that neither Patterson or deceased were armed; and that defendant seized a shotgun and killed the deceased, and that at the time of so doing defendant's life was not in imminent danger, or his person in danger of great bodily harm, and that he had no good reason to believe that such was the case, then the defendant is guilty of murder."

To which instruction so given the defendant then and there excepted, for the following reasons, to wit:

First. Because said instructions invades the province of the jury and is a charge upon the weight of the evidence.

Second. Because said charge purports to sum up the evidence of the defendant in his own behalf, and in so doing grossly mis'tates the facts as testified to by the defendant, and in effect instructs the jury that the facts testified to by defendant constituted murder, and that the defendant claimed a state of facts to exist which would in law be murder, and which said charge was greatly calculated to prejudice the defendant in the minds

of the jury, and to mislead them as to the facts and influence them adversely to the defendant in arriving at a verdict.

25th. And all the instructions whatsoever given by the court to the jury, either at the request of either of the parties or of his own
112 motion, was first reduced to writing and read to the jury by the court, but the court did not give the said instructions or any of them to the jury for them to take with them into their retirement to consider of their verdict, and none of said instructions were before the jury or in their possession while deliberating upon their verdict, but the same were, immediately after being read to the jury by the court, filed with the clerk, and remained in his custody and in his office, to which the defendant then and there excepted.

And because the above and foregoing matter do not appear of record herein, I, Charles S. Johnson, the judge before whom the above and foregoing cause was tried, do hereby settle and allow the foregoing bill of exceptions, and certify that *that* the same is correct, and order that the same be filed as a part of the record herein.

Done in open court this the 8th day of February, 1900, and within the time allowed for settling the said bill of exceptions, by order of the court made on the 13th day of Dec., 1899.

CHARLES S. JOHNSON, *Judge.*

Service of the above and foregoing bill of exceptions is hereby admitted to have been duly and legally made within the district of Alaska on this 8th day of February, 1900.

ROBERT A. FRIEDRICH,
U. S. Dist. Att'y for Dist. of Alaska.

(Indorsed:) No. 1327. In the United States district court in and for the district of Alaska. United States vs. Homer Bird. Bill of exceptions. Filed Feb. 8th, 1900. Albert D. Elliot, clerk; Malony & Cobb, att'ys for defendant.

113 And afterwards, on February 8th, 1900, the defendant filed his petition for writ of error, which is as follows, to wit:

In the United States district court for the district of Alaska.

UNITED STATES)
vs.
HOMER BIRD.)

A. H. Bird, defendant in the above-entitled cause, feeling himself aggrieved by the verdict of the jury and the judgment entered on the 13 day of December, wherein and whereby he was convicted of the crime of murder, the penalty of death imposed upon him by a judgment and sentence of the court, comes now and petitions said court for an order allowing said defendant to prosecute a writ of error to the honorable United States Supreme Court, under and according to the laws of the United States in that behalf made and provided, and also that an order be made and entered suspending the execution of said judgment until the further orders of the said the honorable Supreme Court of the

United States, and all further proceedings in this court be suspended and staid pending the determination of the said writ of error by the said Supreme Court of the United States. And your petitioner will ever pray.

MALONY AND COBB,
Attorneys for Defendant.

(Indorsed:) No. 1327. In the United Stated district court in and for the district of Alaska. United States vs. A. H. Bird. Petition for
114 writ of error. Filed Feb. 8th, 1900. Albert D. Elliot, clerk; Malony & Cobb, att'ys for defendant.

And afterwards, on Feb. 8th, 1900, the following order was made and entered of record, to wit:

In the United States district court for the district of Alaska.

At a stated term, to wit, the November term, A. D. 1899, of the district court of the United States in and for the district of Alaska, held at the court room in Juneau, commencing on the 7th day of November, 1899: Present, the honorable Charles S. Johnson, district judge.

UNITED STATES)
vs.
HOMER BIRD.)

Upon motion of Malony & Cobb, attorneys for defendant, and upon filing a petition for a writ of error, and the assig'ment of errors, it is ordered that a writ of error be, and hereby is, allowed, to have reviewed in the honorable the Supreme Court of the United States the judgment heretofore entered herein, and that all proceedings in this case be suspended pending the determination of said writ of error in the said Supreme Court.

Dated Feb. 8th, 1900.

CHARLES S. JOHNSON,
Judge Dist. Court for the District of Alaska.

(Indorsed:) No. 1327. In the United States district court, in and for the district of Alaska. United States, plaintiff, vs. A. H. Bird, defendant. Order allowing writ of error. Filed Feb. 8, 1900. Albert D. Elliot, clerk; Malony and Cobb, att'ys for defendant.

And afterwards, on the 8th day of February, 1900, a writ of error was filed in the clerk's office, which is as follows, to wit:

115 In the United States district court for the District of Alaska.

UNITED STATES OF AMERICA, *ss.*

The President of the United States of America to the Honorable Charles S. Johnson, judge of the United States district court in and for the District of Alaska, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said district court before you, between

the United States of America, plaintiff, and Homer Bird, defendant, a manifest error hath happened, to the great prejudice of the said defendant, Homer Bird, as is stated and appears by the petition herein.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the Supreme Court of the United States, at the city of Washington, D. C., together with this writ, so as to have the same at the said place before said court, on the 9th day of April, 1900, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct those errors what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 8th day of February, 1900.

[SEAL OF THE DISTRICT COURT OF ALASKA.]

Attest my hand and the seal of the United States district court for the District of Alaska, at the clerk's office at Sitka, Alaska, on the day and year last above written.

ALBERT D. ELLIOT,
Clerk of the United States District Court in and for the District of Alaska.
By J. J. ROGERS,
Deputy.

116 Allowed this 8th day of February, 1900.

CHARLES S. JOHNSON,
Judge of the United States District Court in and for the District of Alaska.

Service of the within writ of error and receipt of the copy thereof is hereby admitted this 8 day of February, 1900.

(Signed) ROBERT A. FRIEDRICH,
U. S. District Attorney in and for the District of Alaska.

The answer of the judge of the United States district court in and for the District of Alaska.

The record and all proceedings whereof mention is made, within, with all things touching the same, we certify under the seal of our said court to the United States Supreme Court within mentioned, at the day and place within contained, as within we are commanded.

By the court.

[SEAL.] ALBERT D. ELLIOT,
Clerk.

(Indorsed:) No. 1327. In the United States district court in and for the District of Alaska. United States vs. Homer Bird. Writ of error. Filed Feb. 8, 1900. Albert D. Elliot, clerk. Malony & Cobb, atty's for defendant. Juneau, Alaska.

And afterwards on the same day the citation in error was issued, and afterwards returned and filed, which is as follows, to wit:

117 In the United States district court for the District of Alaska.

UNITED STATES)
vs.
HOMER BIRD.)

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the United States and R. A. Friedrich, United States district attorney for the District of Alaska, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington, in the District of Columbia, within sixty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the District of Alaska, wherein Homer Bird is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 8th day of February, A. D. 1900, and of the Independence of the United States the 124th.

[COURT SEAL.] CHARLES S. JOHNSON,
United States District Judge in and for the District of Alaska.

ALBERT D. ELLIOT, *Clerk,*
By J. J. ROGERS, *Dep'ty.*

Service of the within citation, and receipt of a copy thereof, is admitted this the 8 day of February, 1900.

ROBERT A. FRIEDRICH,
United States District Attorney in and for the District of Alaska.

118 (Indorsed:) No. 1327. In the United States district court in and for the District of Alaska. United States vs. Homer Bird. Citation filed February 8, 1900. Albert D. Elliot, clerk. Malony & Cobb, att'ys for defendant. Juneau, Alaska.

And afterwards, on Feb. 8th, 1900, defendant filed his assignment of errors, which is as follows, to wit:

In the United States district court for the District of Alaska.

THE UNITED STATES)
vs.
HOMER BIRD.)

Now comes the defendant, and assigns the following errors committed by the court, on the trial of the above entitled and numbered cause:

1st. The court erred in overruling the defendant's application for a continuance.

2nd. The court erred in compelling the defendant to go to trial with and selecting his trial jury from the panel of forty-three names contained in the jury box, from which the jury was being drawn, as shown by the bill of exceptions No. 2.

3rd. The court erred in permitting counsel for the Government in examining the jurors upon their voir dire, to ask said jurors whether the fact that defendant brings his wife and child into court would in anywise influence their verdict, and whether the fact that he was a man with a family and had a wife and child would in anywise influence them in arriving at a verdict.

4th. The court erred in allowing the challenge of the Government to the jurors J. French and E. R. Jaeger, as shown by bill of exceptions No. 3.

5th. The court erred in overruling the challenge of the defendant to the jurors C. D. Shaw and C. M. Summers, as shown by bill of exceptions No. 4, and compelling the defendant either to accept said jurors or exhaust a peremptory challenge upon them.

119 6th. The court erred in sustaining the challenge of the Government to the jurors Henry Hall and Floyd Ryus.

7th. The court erred in sustaining the challenge of the Government to the jurors D. Ledbetter, George Walker, M. Raber, and H. Patterson, said challenge being upon the ground that said jurors were not competent jurors, for the reason that they had served as jurors in the district court of Alaska within one year next before the convening of this term. The court examined the said jurors upon their voir dire, showing that they had not, within said year, served upon any regular panel as a juror, but had only served as a talisman.

8th. The court erred in sustaining the challenge of the Government to the juror C. L. Parish; said challenge was based upon the ground that said juror had served as a juryman when summoned as a talisman at the fall term of this court, 1899.

9th. The court erred in compelling the defendant to go to trial before the jury of twelve selected, empanelled, and sworn in this case.

10th. The court erred in admitting the testimony of the witness Charles Scheffler over the objections of the defendant, which testimony was as follows, to wit: Witness testified that in the month of August, when the defendant, in company with the deceased Hurlin, R. L. Patterson, Naomi Strong, and witness, were going up the Yukon River in a steam launch towing a barge loaded with their provisions, Hurlin was steering; that the defendant was very disagreeable to all the other persons; that when they would run into a sand bar, he would curse them; he would say, "The Dutch sons of bitches don't know where to run it." On one occasion they were getting wood on the beach of the river and Bird got out and wanted

120 to hit Patterson. Witness did not remember exactly what was said, but defendant called Patterson "a son of a bitch," and told him "he would hammer the devil out of him," and witness and others would not let them fight. And if anything would go wrong, he, defendant, would not curse in front of witness's and the other's faces, but defendant would be disagreeable.

11th. The court erred in admitting over the objections of the defendant the testimony of Charles Scheffler shown by bill of exceptions No. 10, being as follows, to wit:

Q. (By the GOVERNMENT). State whether or not during your trip from St. Michaels to the place where you finally went into winter quarters, the conduct of this defendant towards all the rest of the party was domineering and he manifested a high temper.

To which question defendant by his counsel objected, because the same is leading and suggestive and improper, and calling for a conclusion of the witness, which objection was by the court sustained. Counsel for the Government thereupon asked the witness the following question:

Q. State generally what was the conduct and bearing of this defendant towards the party from the time you left St. Michaels until the time you went into winter quarters.

To which question defendant by his counsel objected, because leading and suggestive, and calling for a conclusion of the witness, and for the further reason that the Government's counsel has just asked a question highly leading and suggestive of the answer desired, to which the court sustained an objection, and by allowing the above question, seeking
121 the same testimony as was sought by the question excluded, the Government's counsel is in effect leading the witness; but the court overruled said objection, and the witness answered that the defendant would at times be friendly and then he would be very disagreeable; that he abused the woman once that he knew of.

12th. The court erred in admitting in evidence to the jury over the objections of defendant the testimony of the witness Charles Scheffler, as follows, to wit: After the witness had testified that on the morning of the 27th of September, 1898, the defendant Bird shot and killed the deceased Hurlin with a double-barreled shotgun, which shooting took place on the Yukon River, and within a boat or scow moored to the banks of the river; that he immediately with the other barrel shot and wounded one R. L. Patterson; that Patterson afterwards jumped overboard from the rear of said scow, and that Bird, the defendant, thereupon left the scow and went upon the bank of said river, and standing upon the bank with his gun recharged, he again fired at R. L. Patterson while he was in the water. That Patterson begged the defendant not to shoot him, and the defendant began to curse and swear at him. Witness could not tell exactly what was said, but Patterson begged defendant not to shoot him for his family's sake and for his child, and all like that, and the defendant cursed him and said, "God damn you, you are the cause of it all," and shot at Patterson again with the shotgun; witness could hear the splash of the water when the shot was fired. The defendant then called Patterson out, but Patterson kept on begging him not to shoot him and all that sort of thing, and the defendant told him to come out, that he would'nt hurt him, and Patterson came out of the water and walked up to the defendant and fell down. Defendant then called
122 witness out of the scow and said, "Come out here and help your friend," and witness went out on the bank and defendant got into the bow of the boat or scow. At that time he had a shotgun and rifle. Witness got a blanket and threw it out for Patterson to lay on, and Patterson was begging him for God's sake to take him to the cabin. The

defendant stooped down about that time and shook hands with Patterson and said he was sorry he did that. Witness didn't remember exactly what was said, and the woman was standing around there crying. The defendant told her to shut up, but she said she couldn't help it. You could see the hole in Patterson's shoulder where he was shot, and he, defendant, took one side of Patterson and witness took the other side and they led him down the river then up the hill to the cabin. And witness staid there with Patterson, and the woman Naomi Strong remained at the boat.

13th. The court erred in admitting in evidence to the jury, over the objections of the defendant, the testimony of Charles Scheffler as to the conversation between said witness and R. L. Patterson, shown in bill of exception No. 13.

14th. The court erred in admitting in evidence to the jury, over the objections of defendant, the testimony of the witness Charles Scheffler, as shown in bill of exceptions No. 14.

15. The court erred in refusing to permit counsel for the defendant to show, on the cross-examination of the witness Charles Scheffler, whether or not the witness now trusted the other witness for the prosecution, Naomi Strong, for the reason that on the theory of the case for the defense it was material to show relations now existing between said witnesses as a motive for the perjured testimony defendant claims they were giving against him.

16th. The court erred in refusing the motion of the defendant for process to obtain from the trunk of Naomi Strong, then in charge
123 of the marshal, the marriage certificate, showing the marriage between the said witness Naomi Strong and the defendant, and in further refusing to compel the said witness, when being cross-examined by the counsel for the defendant, to give her married name; said testimony being competent and material for the purpose of disqualifying the said witness from testifying against defendant.

17th. The court erred in allowing the witness Wallace Blain to testify to the alleged confession or admission made by the defendant to him of the crime charged in the indictment, because said admissions were shown to have been made under fear and duress, and to have been induced by promises of protection from mob violence, as shown by bill of exceptions No. 16.

18th. The court erred in allowing the witness Blain and the witness Vawyer to testify as to the escape of the defendant from the jail at St. Michael, for the reason that the said escape having occurred more than a year subsequent to the commission of the crime, was too remote, and was therefore incompetent and immaterial.

19th. The court erred in sustaining the objections of the Government to allowing the defendant to show by the witness Mrs. Van Horn that he was a member of the New Orleans Board of Exchange, the objection of the Government to said testimony being that it was incompetent and immaterial; and the court further erred in the language used in the presence of the jury, in sustaining the said objection, which language was as follows, to wit: "A man might be a member of the Board of Trade of New York, and yet might be the biggest scoundrel in New York City. The objection is sustained for the reason that it does not tend to show

either the character or standing of the defendant, or his reputation for peace and quietude, or truth and veracity;" said language tending to prejudice the defendant in the minds of the jury.

124 20th. The court erred in refusing to allow the jury to be taken out to some suitable place and allowed to witness the effect of a discharge from a 12-bore shotgun loaded with shot similar to that claimed by the prosecution to have been used in the shooting of deceased Hurlin and Patterson, for the purpose of showing the degree that shot will scatter at the distance testified to by the witnesses for the prosecution, as shown in the bill of exceptions, No 20.

21st. The defendant, when upon the witness stand and testifying in his own behalf, stated that after the shooting of Hurlin and Patterson the witness Charles Scheffler stated to him, the defendant, that prior to the said difficulty the said Hurlin and Patterson wanted him, the said witness Scheffler, to join with them in the trouble with defendant, and he refused. Afterwards the Government recalled the witness Scheffler in rebuttal and asked him if he made such a statement, and the witness admitted that he did make such a statement to defendant. Counsel for the Government thereupon asked the witness, "Now, then, explain why you came to make it." Defendant, by his counsel, objected to the question and the testimony sought to be elicited thereby, for the reason that it was irrelevant and immaterial, the witness' private reasons therefore not being material to any issues in the case; but the court over'uled said objection and allowed said witness to testify that he made said statement because he feared defendant, and that everything he had to say to defen'ant had to be "Yes," and that the statement was untrue and that the deceased Hurlin and Patterson never made such request of the witnes'; and there was error in the ruling of the court in admitting said testimony to go to the jury over the objection of the defendant.

22nd. The court erred in refusing to stop the counsel for the Gov-
125 ernment in his closing argument to the jury, wherein he argued that the defendant, by his counsel, was saving exceptions to the action of the court and availing himself of every technicality in the hope of securing a reversal of the case by the Supreme Court; that they placed their reliance there and *and* not upon an acquittal upon the merits, and were attempting to make a record to reverse the judgment of this court in the Supreme Court.

23rd. The court erred in giving the first paragraph of the instructions to the jury asked by the plaintiff, which reads as follows, to wit: "The court instructs the jury, if they believe from the evidence beyond a reasonable doubt that the defendant, Homer Bird, on the 27th day of September, 1898, at a point on the Yukon River, about two miles below the coal mine known as Camp Dewey, and about eighty-five miles above Anvik, and within the district of Alaska, shot and killed one J. H. Hurlin, and that said killing was malicious, premedi'ated, and willful, and that said killing was not in the necessary defense of the defendant's life or to prevent the infliction upon him of great bodily harm, then it is your duty to find the defendant guilty, as charged in the indictment."

24th. The court further erred in giving the third paragraph of the instructions asked by the plaintiff to the jury, which reads as follows, to wit: "That as in this case, where it is claimed by the defendant that up

to the time of the killing of the deceased there had been no previous quarrel or difficulty, but that the relations had been friendly and amicable, but that in the discussion between defendant, deceased, and one Patterson, of a business matter, a quarrel suddenly sprung up between Patterson and defendant, and defendant struck Patterson in the face after having first been hit by Patterson in the side; that thereupon Patterson started to run away and deceased started in another direction; that neither
126 Patterson nor deceased were armed, and that defendant seized a shotgun and killed the deceased, and that at the time of so doing defendant's life was not in imminent danger or his person in danger of great bodily harm, and that he had no good reason to believe that such was the case, then the defendant is guilty of murder."

24th. The court erred in not sending out with the jury, in their retirement to consider the case, the written instructions that had been given them, as required by law.

25th. The court erred in pronouncing judgment and sentence upon the verdict of the jury, and judging and sentencing defendant to be hanged on the 9th day of February, 1900, the said date so fixed being less than sixty days from and after the pronouncing and entering of said judgment and being contrary to the law. And for the said errors, and others manifest of record, defendant prays the said judgment of the court and the verdict of the jury be set aside and held for naught, and that he be granted a new trial.

MALONY & COBB,
Attorneys for Defendant.

Service of the above and foregoing assig'ment of errors is hereby admitted to have been duly and legally made within the district of Alaska, on this 8th day of February, 1900.

ROBERT A. FRIEDRICH,
U. S. Dist. Att'y for Dist. of Alaska.

(Indorsed:) No. 1327. In the United States district court in and for the district of Alaska. United States vs. Homer Bird. Assignment of error, filed February 8th, 1900. Albert D. Elliot, clerk; Malony & Cobb, att'ys for defendant, Juneau, Alaska.

127 And afterwards on March 3rd, 1900, the following order was made and entered of record, to wit:

UNITED STATES)
vs.
HOMER BIRD.)

The above cause coming on to be heard upon the motion of defendant, by his attorneys, Malony & Cobb, for an order extending the time within which to file the transcript of the record in the Supreme Court, and because it appears to the court that said transcript can not be made and transmitted to our said Supreme Court at Washington within the time provided by law, it is ordered that said motion be granted, and that the time within which the transcript of the record herein may be filed in our said Supreme Court be, and the same is hereby, extended sixty days

in addition to the time allowed by law. Done in open court this March 3rd, 1900.

CHARLES S. JOHNSON, *Judge.*

(Indorsed:) No. 1327. In the United States district court in and for the district of Alaska, United States vs. Homer Bird. Order extending time to file record. Filed March 3rd, 1900. Albert D. Elliot, clerk.

128 UNITED STATES OF AMERICA, *district of Alaska, ss:*

Clerk's certificate to transcript.

I, Albert D. Elliot, clerk of the district court of the United States of America for the district of Alaska, do hereby certify that the foregoing pages, numbered from one to 128, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of the United States, plaintiff, vs. Homer Bird, defendant, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of said court to be hereunto affixed, at the town of Sitka, in said district, the 30th day of April, A. D. 1900.

ALBERT D. ELLIOT, *Clerk.*

(Indorsement on cover:) File No. 17758. Alaska, D. C. U. S. Term No., 278. Homer Bird, plaintiff in error, vs. The United States. Filed May 12, 1900.

26008

No. 278.

FILED
NOV 28 1900
JAMES H. McKENNEY,
Clerk.

Brf. of Dudley & McHenry for P. C.

SUPREME COURT

of the United States.

Filed Nov. 28, 1900.

OCTOBER TERM, 1900.

No. 278.

HOMER BIRD, Plaintiff in Error,

vs.

THE UNITED STATES.

In error to the District Court of the United States for the District of Alaska

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Brief of Plaintiff in Error.

MALONY & COBB,

of Counsel for Plaintiff in Error.

Daily Dispatch Print, Juneau, Alaska.

26010

SUPREME COURT

of the United States.

OCTOBER TERM, 1900.

No. 278.

HOMER BIRD, Plaintiff in Error,

vs.

THE UNITED STATES.

In error to the District Court of the United States for the District of Alaska

Brief of Plaintiff in Error.

MALONY & COBB,
of Counsel for Plaintiff in Error.

STATEMENT OF THE CASE.

The folow ing is a statement of the case sufficient to enable the Court to understand the questions raised:

On the 9th day of November, 1899, the grand jury for the

District of Alaska returned an indictment against Homer Bird, the plaintiff in error, charging him with the crime of murder, alleged to have been commited on the 27th day of September, 1898, on the Yukon river, in said District, at a point about 600 miles above the mouth of said river, by shooting and killing one J. H. Hurlin.

The defendant was arraigned on November 10th, and served with a list of the petit jury for that term of Court. (Printed record p. 2.)

On November 13th defendant plead not guilty and the cause was set for trial for the next day, leave however, being given by the Court to file an application for a continuance. [Printed record p. 4.]

The application was presented [Rec. 4-6] and denied. [Rec. 6.]

The defendant was put upon his trial on December 1st, 1899, [Rec. p. 8] and was convicted [Rec. 22] and sentence of death imposed [Rec. 37.] A bill of exceptions was settled and allowed, [Rec. 40-61] a petition for a writ of error presented. [Rec. 61] and allowed, (Rec. 62) a writ of error sued out, citation in error served, (Rec. 64) errors assigned, (Rec. 64-69) and the case is now here presented for correction and revision.

A party of five, composed of Hurlin, the deceased, Robert L. Patterson, Charles Scheffler, Homer Bird, the defendant, and a woman going under the assumed name of Naomi Strong, left the city of New Orleans in the early part of the year 1898, bound for the Yukon river, to prospect for gold. Defendant and Naomi Strong had been acquainted for some years prior thereto and had sustained intimate sexual relations toward each other. The other men in the party however, and the defendant were strangers until a short time prior to their leaving New Orleans and the acquaintance was begun by the defendant answering an advertisment inserted in the newspapers by Patterson, for a man with some money to join in a prospecting excursion to Alaska. The party

reached San Francisco in May, 1898, and in addition to an outfit of clothes and provisions to last them 18 months or two years, also procured a small steam launch and a scow. This scow was 32 feet long, 6 or 7 feet beam and 3 feet deep. The whole outfit cost about $2000.00 It had been agreed that each of the men in the party was to furnish $500.00, but Scheffler failed to furnish anything, and Hurlin and Patterson furnished about $500.00 each and the defendant $1000.00. The party sailed from San Francisco May 21st and reached St, Michaels early in July. On the vessel the defendant and the woman occupied the same stateroom as man and wife under the name of Mr. and Mrs. Burdick, and Patterson, claiming to be the woman's brother, also had a berth in the same room About a week after reaching St. Michaels the party left for the Yukon in their two boats, the scow being towed by the steam launch. The provisions, etc., were packed in the scow in the following manner: Beginning about four feet from the stern of the scow, the entire space forward to a point near the bow, was filled in to about the depth of the boat itself, the boxes, bags, etc., being packed in such manner that the top thereof was level. In the stern was a seat, upon one end of which was a cook stove where the cooking for the party was done, and between the seat and the provisions was an open or vacant space about 2 feet wide, running the entire width of the boat. In this space on the right hand side, looking forward, sat a water barrel, ordinary size. The end of the pile of provisions next this empty space was also utilized as a seat, and on one side of it, next the water barrel, was a box about 2 feet long, in which the dishes, knives, forks, etc., were kept, commonly called the grub box. This scow was entirely covered in with a canvas cover and was the general living place of the party. Just forward of the grub box, on the right hand side looking forward, and made down lengthwise of the boat, on top of the provisions was the bed occupied by defendant and Naomi Strong. On the other side, just opposite, and with barely passage way between, was the bed occupied by Patterson, made down in the same way. On the forward end of the provisions, and made down across the boat was the bed occupied by Hurlin, the deceased, and Schef-

fler.

Sometime in September the party reached a point on the Yukon river about 600 miles above its mouth and some two miles below a coal miners' camp, and determined to go into winter quarters. For that purpose they began the construction of a cabin. About the 24th of September the party determined to separate, Hurlin, Patterson and Scheffler going away and defendant and Naomi Strong remaining together, The tragedy occured on the morning of September 27th.

Up to this point there is no serious conflict in the testimony. But regarding the causes that led up to the fatal difficulty, and the circumstances immediately surrounding the killing, the evidence was sharply conflicting, and often squarely contradictory. The only eye-witnesses to the homicide, beside the defendant himself, were Charles Scheffler and Naomi Strong.

The theory of the prosecution, based upon the testimony of these two witnesses, was that defendant was so quarrelsome and disagreeable that on September 24th the three men, Hurlin, Patterson and Scheffler determined to leave defendant and the woman; at defendant's request, however, they agreed to stay and help finish the cabin. The cabin was finished on September 26th, In the meantime there had been disagreements about the division of the supplies—Hurlin and Patterson wanting three-fifths for their party and defendant claiming one-half on the ground that he had paid for one-half. Defendant proposed to leave this matter to arbitration before the coal miners at the camp two miles above, but Hurlin and Patterson refused. This matter had not been adjusted on the morning of the 27th. On that morning the party sat down to breakfast, in the following order: Hurlin, Patterson and Scheffler on the rear end of the pile of provisions in the scow, facing the stern of the scow, Hurlin next the grub box, Scheffler in the middle and Patterson on his right and next the left or port side of the scow. Naomi Strong sat on the seat in the rear of the scow, immediately in front of and facing

Hurlin. Defendant sat upon his bed about four feet behind, and a little to the left of Hurlin and the other men. While the party were eating breakfast, defendant suddenly, and without warning, rose up with his shot gun in his hands, shot and killed Hurlin, the shot taking effect in the back of the head, and shot and seriously wounded Patterson, the shot taking effect from the lower part of the left shoulder blade up to the jaw. (Printed R. pp 49 to 52.)

It was claimed by the defendant on the other hand, that up to the 20th or 22nd of Sept. there had been no serious disagreement between the parties; that about that date, Hurlin, Patterson and Scheffler determined to leave and cut wood for the steamers that would go up the river in the spring. At defendant's request they remained until the 26th to help finish the cabin. A few days before the shooting, defendant and Hurlin and Patterson had a disagreement about dividing provisions, they wanting to take three-fifths, and defendant insisting upon one-half, and defendant proposed to arbitrate before the coal miners, but Hurlin and Patterson refused. Nothing more was said about it, however, 'till the morning of the 27th. On the night of the 26th up at the cabin Naomi Strong warned defendant that Hurlin and Patterson were down at the scow loading their guns, and that if he, defendant did not "let them have the provisions there was going to be trouble." When defendant returned to the boat, however, Hurlin and Patterson had gone to bed and nothing was said. The morning of the 27th, Hurlin and Scheffler got up first and went up into the woods towards the cabin. Defendant then arose, got his coffee, gave the woman her coffee and went up to the cabin, leaving Patterson in bed. About an hour later Scheffler came up to the cabin and told defendant that Patterson said come down and divide the provisions. Scheffler went back ahead of defendant and defendant told him he would be down in a minute. In a little while defendant went down, and Patterson was on the bank, where he had laid out a lot of brush to put the provisions on. Defendant walked into the boat, and Naomi Strong called them all to breakfast. They all had breakfast, during which nothing of any moment occurred.

After breakfast Naomi Strong and Scheffler began washing up the dishes, and defendant sat down upon his bed, and Patterson and Hurlin sat down upon Patterson's bed. Hurlin got out his bills and defendant got out his bills and begun to cast up what each had paid out, and they "began jawing." Hurlin and Patterson wanted the provisions divided into five equal shares, but defendant objected to this on the ground that Scheffler had paid nothing, and proposed to get John Tompkins the coal miner and let him make the division. Hurlin and Patterson refused to do this, and said they would divide the provisions to suit themselves. Defendant replied, "no you won't, you want to beat me out of my money I put up." And Patterson said "you are a damn liar," and struck defendant in the face. Defendant thereupon struck Patterson in the eye. At that moment Naomi cried out, "look out Homer, they are going for their guns," and defendant ran and got his gun from behind the water barrel, the place where it was usually kept. When defendant got his gun, Hurlin was getting his gun, which was under his sleeping bag, and he was in a stooping position, with his face towards the left side of the boat, raising up with the gun in his hand and the defendant shot him, and Hurlin fell over in front of the pile of provisions, falling across his gun, and in his fall he broke the stock of it. Defendant then looked and saw Patterson pass up from under the canvas cover that was over the boat toward the gun that was standing in the bow and shot him with the other barrel. Defendant's object in shooting Patterson was because he thought he was making for his gun. His attention was called to them by Naomi Strong. Hurlin was shot in the left side of the face and Patterson in the left shoulder. Patterson ran out of the bow of the boat onto the shore. He never was in the water at all, and defendant never fired at him but the one time. (Pr. R. pp 52-4). And this was all the testimony on behalf of the defendant relating to the circumstances of the killing and the provocation that led up to it. (R. p 54.)

The errors that will be relied upon relate to the action of the court in empaneling the jury; sustaining improper challenges for

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cause made by the government; in admitting improper evidence in behalf of the plaintiffs; improper argument of the District Attorney permitted by the Court over the defendant's objection; errors in instructions given to the jury; and the failure of the Court to send out with the jury on their retirement, the written instructions given. These points will now be presented in their order.

THE SECOND AND NINTH ASSIGNMENT OF ERRORS

Relate to the same point and will be presented together. These two assignments question the correctness of the action of the Court, in compelling the defendant to go to trial with, and selecting his trial jury from the panel of 43 names contained in the jury box and putting him on trial before the jury of 12 finally selected. (R. p 65). The bill of exceptions (p 41), shows the following state of facts: On Nov. 9th 1899, the defendant was served with a list of names, purporting to be a list of petit jurors drawn for that term of the District Court for the District of Alaska and to be the panel of jurors from which the trial jury for the trial of his cause would be drawn. Said list contained the names of 75 persons. Afterwards on the 1st day of December 1899, when the defendant was put upon trial, only 43 of said names remained in the jury box. It further appeared that 24 of the jurors drawn for that term had been excused by the Court, prior to the calling of this cause for trial and of the remaining 8 persons, one was sick and 7 had not been served. The defendant thereupon objected to further proceeding with the trial of said cause at said time and the further selecting and drawing of said jury from said box, because he had not been served with the correct list of names, in such jury box and because 24 jurors, whose names appeared upon the list

when served upon the defendant, had been excused without the consent of the defendant and the defendant was therefore denied his legal right to be tried by a jury selected from the panel served upon him, but the Court overruled said objections and ordered the trial to proceed, to which action of the Court, defendant duly excepted. And it further transpired that when 8 jurors had been selected, accepted and sworn upon the trial of said cause, the 43 jurors whose names were in the jury box were exhausted and the Court ordered the Marshal to summon bystanders to complete the panel, and the defendant thereupon renewed the objections above made and to the summoning of the bystanders and the selecting of the balance of the trial jury therefrom, for the reason that having been served with a list of the jury drawn according to law, he had a legal right to a trial by jury selected from such list, and it was a denial of such right to excuse a third of such list and compel him to go to trial by a jury selected from bystanders; but the Court overruled said objections and ordered the summoning of the bystanders, from among whom 4 additional jurors were selected; to which action of the Court defendant duly excepted [R. p 41].

Section 119 of the Alaska Code of Criminal Procedure, provides: "That jurors for the trial of persons accused of any of the crimes defined in the laws of the United States applicable to the District of Alaska.....shall be selected and summoned in the manner prescribed by the laws of the U. S. with respect to jurors in the United States District and Circuit Courts" Section 1033 of the Revised Stat. of the U. S. requires, in a capital case, that a list of the jurors shall be delivered to the defendant two entire days before the trial. It is clearly the purpose of the law by the provisions quoted, to give a defendant, upon trial for his life an opportunity to know who the men are, from among whom his trial jury are to be selected. This is an important right and very valuable to the defendant to enable him to intelligently exercise his right of peremptory challenge. In this case between the time when the jury was served and the time when defendant was put upon trial, the Court arbitrarily and without defendant's consent,

excused 24 men from said list. This we think a clear denial of a legal right of defendant. If the Court had the right to excuse 24 of the jury drawn, without reason, he had a right to excuse 74 and thus negative a valuable right given to the defendant by law. In this case we think the Court had no more right to arbitrarily compel the defendant to go to trial before a jury one-third of which was selected from bystanders than it would to compel him to go to trial before a jury composed of bystanders entirely. We do not question the propriety of completing a jury by summoning bystanders when the regular panel has been legally exhausted. But the point is, that the Court arbitrarily excused a large part of the regular panel, thus creating a necessity for the summoning of bystanders, which would not otherwise have arisen.

(1 Thompson on Trials, sec. 21.)

THE FOURTH ASSIGNMENT OF ERROR

challenges the action of the Court in sustaining the challenge of the Government for cause to the juror E. R Jaeger.

The bill of exceptions (R. p. 42-43), shows in effect that when the juror was being examined upon his voir dire, his examination showed in substance that the juror would require stronger testimony to convict the defendant if he was shown to have a wife and child than if he were a single man. That it would take stronger testimony for him to render the same verdict against a man with a wife and child than it would against a single man. The District Attorney thereupon challenged the juror for cause. The defendant resisted said challenge but the same was allowed by the Court; the defendant duly excepted.

We think this clearly erroneous. If a man has given "Hostages to fate," we think he has a right to have that fact considered when put upon trial for his life for an alleged crime Where the evidence is conflicting and one theory of the case means death, and the other theory of the case means liberty, the defendant has a right, we think, to throw into the scale, if he can, not only his previous good character, but also the fact that he has a wife and children and others depending upon him, as showing the strongest reasons for abstaining from crime; and a juryman who knows so little of human nature that he would require no stronger evidence to convict a man in the one case than he would in the other, would be unfit to pass upon the life of a fellow-man.

SIXTH ASSIGNMENT OF ERROR

is as follows: "The Court erred in sustaining the challenge of the Government to the jurors Henry Hall and Floyd Ryus," [R. p. 65]. The bill of exceptions, (R. p. 47) shows that when these two jurors were being examined upon their voir dire they stated that they served as jurors at the regular term of the court in November, 1898, but had not served as jurors since the said term. They were thereupon challenged by the Government, which challenges were resisted by the defendant, But the Court allowed the challenge and excused the jurors to which ruling of the Court defendant duly excepted.

It is difficult to see any reason for the action of the Court in this matter other than that the Government did not want said jurors and the Court was not willing to make the Government exhaust peremptory challenges upon them. The trial took place in December; more than a year had gone by, since the jurors had served in that capacity before, yet they were challenged on that ground and the challenge sustained. The statute (21 U. S. Stats., 43) pro-

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vides that no person shall serve as a petit juror more than ONE TERM in any one year. Service as a juror at the November term, 1898, is not a disqualification of a petit juror at the November term, 1899.

THE SEVENTH ASSIGNMENT OF ERROR.

This assignment questions the action of the Court in sustaining the challenge of the Government to the jurors D. Ledbetter, George Walker, M. Raber and H. Patterson. (R. p. 65).

The bill of exceptions [6th par. R. p. 47] shows that when these jurors were being examined upon their voir dire, they stated that they had not served as jurors, upon any regular panel, within one year next preceding the convening of that term of court, but had served as talesmen in that period, whereupon counsel for Government challenged said jurors for cause, which challenges were resisted by defendant, but were sustained by the Court and the jurors excused, to which action of the Court defendant excepted.

This action of the Court was clearly erroneous, [21 U S. Stats. 43] forbids any person to serve as a petit juror more than one TERM in any one year, and clearly does not disqualify a person, merely because he has served as talesman on one particular case. Such service is not a service for more than one TERM.

EIGHTH ASSIGNMENT OF ERROR.

This assignment questions the action of the Court in sustaining the challenge of the Government to the juror C. L. Parish, [R p 65]. The bill of exception [7 Par. R. p 47], shows that when the juror was being examined upon his voir dire, he stated that he had not served at any term of the District Court of Alaska as a juryman upon a regular panel within one year next before the convening of this term of Court. That his last service as a juryman was as a talesman at the fall term of this Court, 1898. The Government thereupon challenged said juror for cause, which challenge was resisted by the defendant, but was allowed by the Court and the juror therefore excused, to which ruling of the Court defendant then and there excepted.

The foregoing assignments, we think require a reversal of case, as he was put upon trial before a jury, not drawn and made up as required by law, and because the action of the Court was highly prejudicial to the defendant, in that it, in effect allowed the Government eight more peremptory challenges than it was entitled to by law.

TENTH ASSIGNMENT OF ERROR.

This assignment relates to the action of the Court in allowing to go to the jury, the following testimony of the witness Chas. Scheffler, to-wit: "Witness testified that in the month of August, when the defendant in company with the deceased, Hurlin, R. L. Patterson, Naomi Strong and witness, were going up the Yukon river, in a steam launch, towing a barge loaded with their provisions, Hurlin was steering; that the defendant was very disagreeable to all the other persons; that when they would run into a sand

bar he would curse them; he would say: 'the Dutch sons of bitches don't know where to run it.' On one occasion they were getting wood on the bank of the river and Bird got out and wanted to hit Patterson. Witness didn't remember exactly what was said, but defendant called Patterson 'a son of a bitch' and told him he would 'hammer the devil out of him,' and witness and others would not let them fight. And if anything would go wrong, he, defendant, would not curse in front of the witness and others' faces, but defendant would be disagreeable all the way long and make things very disagreeable. [R. p 65.]

The bill of exceptions, [Par. 10, R. p 54] shows that when this testimony above set out was offered, it was objected to by counsel for the defendant, because it was immaterial and irrelevant and too remote from the time the offense is charged to have been committed, which objections the Court overruled and allowed said testimony to go to the jury.

This action of the Court was clearly erroneous and highly prejudicial to the defendant under the peculiar circumstances of this case. The only two eye-witnesses to the alleged crime, were as defendant claimed, animated in their testimony by enmity and a desire to see him convicted. He claimed that their testimony was false in all its material points; but to meet and overcome this testimony, defendant was from the circumstances of the case, compelled to rely upon his own testimony and whatever improbabilities and contradictions, might exist in the testimony of the witnesses for the prosecution. Under these circumstances to allow the Government to introduce testimony, relating to a quarrel and fight with a person other than the deceased, occurring more than a month, prior to the homicide, and not shown to have the slightest connection with it, was highly erroneous. (Wharton's Crim. Ev. 9th Ed. Sec. 30.)

THIRTEENTH ASSIGNMENT OF ERROR

This assignment questions the correctness of the action of the Court, in admitting before the jury, the following testimony of the witness Chas. Scheffler: "That the reason witness did not take occasion to tell the condition of affairs at their cabin on the evening after the killing of Hurlin and the shooting of Patterson, was that the defendant was watching him all the time and that he couldn't do it; that Patterson was holding secret conversations with defendant and witness could not rely upon Patterson and couldn't trust the woman Naomi Strong, and didn't know what to do. That at the time he took Patterson up to the cabin witness told him, "Bob, I am going to get help" and Patterson said, "that man will finish killing me," and witness promised to stick by him This was not in defendant's presence but it was the first time they took him up to the cabin. Patterson told witness not to go and that he wanted witness to stay with him. And to all that part of the testimony as to the conversation between witness and the said Patterson in the absence of the defendant, the defendant objected because incompetent, irrelevant and immaterial, but the Court overruled said objections and allowed said testimony to go to the jury, to which ruling of the Court, defendant then and there excepted (13 Par. R. p 66.)"

The testimony of this witness, (R. p 50), as well as that of the witness Naomi Strong, (R. p 52) showed that from the time of the homicide, on the 27th of September, until the following March they had been active in concealing the matter from the knowledge of people who were frequently passing. For the purpose apparently of excusing this singular conduct, the Government offered and the Court allowed, the witness to testify to requests made by Patterson and promises made by witness to Patterson, in a private interview between them, which was purely hearsay and incompetent. Not only that, but the Government offered and the Court allowed the witness to testify to a statement of Pattersons that the defendant would "finish killing him" if the witness left him to go for help, which at best could only have been an opinion of Patter-

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son as to an intention of defendant to commit another and different crime than that for which he was on trial. That this was error, is an elementary rule of evidence.

FOURTEENTH ASSIGNMENT OF ERROR.

This assignment (R. p 67), questions the action of the Court in admitting in evidence to the jury, the following testimony of the witness Scheffler: "That in the latter part of March, 1899, after Patterson had been carried to Anvik, Bird made a trip up the river and came back with a man by the name of Smith; that Smith left and the next day after that Bird was very disagreeable and tried to pick a fight with the woman Naomi Strong; he acted very funny. You had to watch him and be careful. He got awful good after that, and everything was just so. It was Chas. this and Naomi this."

The bill of exceptions (14 par. R. p. 56) shows that when this testimony was offered the defendant objected to it because irrelevant, incompetent and immaterial. But the Court overruled the objections and permitted the testimony to go to the jury, and the defendant excepted.

The only possible object in introducing this testimony was evidently to show that the defendant was a generally bad man, who would even pick a fight with a woman. The matters testified above occurred six months after the alleged homicide and had absolutely no bearing whatever upon the guilt or innocence of the

defendant; but it is impossible to say what importance may have been attached to such testimony by the jury sanctioned as it was, by the Court.

TWENTIETH ASSIGNMENT OF ERROR

This assignment of error raises the following questions: [R. p. 63]. The bill of exceptions shows [R. p. 59] that the witnesses Naomi Strong and Chas. Scheffler were the only eye-witnesses to the homicide. In describing the wounds inflicted upon Patterson, they stated in substance that he was shot with a 12-bore shotgun loaded with BB or buck shot. That the defendant at the time the shot was fired, was at a distance not exceeding six feet from Patterson. That the shot however took effect from the lower part of the shoulder blade up to a point under the left jaw, a space of from 15 to 18 inches. The defendant thereupon requested that the jury might be taken out in charge of a proper officer to some suitable place and allowed to witness the discharge of a No. 12 shotgun, loaded with shot similar to that described by the witnesses, for the purpose of showing the degree that shot will scatter at the distance testified to by the witnesses for the prosecution, it being expected to show that it was physically impossible for such a wound as that testified to by said witnesses to have been inflicted at the distance described by them, and to corroborate the testimony of the defendant as to the manner of the shooting; but the Court denied said request, to which action of the Court defendant excepted.

We think under the peculiar circumstances of this case the above action of the Court is such error as requires a reversal of the judgment. If the witnesses for the prosecution were telling the truth, the defendant was guilty of a cold blooded murder. If

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the defendant was telling the truth he was acting purely in self defense. Now any circumstance that tended to corroborate one or the other was relevant and highly material. The witnesses for the prosecution placed the defendant at a distance not exceeding six feet from Patterson at the time he was shot; but they could not very well testify falsely as to the character of the wounds themselves, since these had been seen by many people after Patterson had been taken to Anvik. If defendant could show that the character of wound inflicted upon Patterson, could not have been inflicted with a shotgun at the short distance of six feet, it was an exceedingly strong circumstance to discredit the whole story of the prosecution. Not only that, but it corroborated the defendant's story, according to which, he was at a distance of about 30 feet from Patterson at the time he shot him. Now if the defendant was entitled to such testimony, clearly the best evidence of it would have been to let the jury witness a discharge of a similar weapon at a like distance, charged with a like load of shot.

TWENTY-FIRST ASSIGNMENT OF ERROR.

This assignment complains of the action of the Court in the following particulars: (R. p 68). It appears from the bill of exceptions (1st Par. R. p 59,) that after the defendant had testified in his own behalf, that immediately after the shooting of Hurlin and Patterson, Scheffler had stated to defendant that they wanted him to join in the trouble and he refused. The Government recalled the witness Scheffler, who admitted that he made the statement. Counsel for the Government thereupon asked the witness "Now then explain why you came to make it," and the witness tes-

tified in substance, that he made said statement because he feared defendant, and everything he said to him had to be yes, and that the statement was untrue and that Hurlin and Patterson never made such request; to which testimony the defendant objected, because the witness's private reasons for making the statement imputed to him were irrelevant and immaterial; but the Court overruled said objections and permitted the testimony to go to the jury.

We submit the point above made without comment

TWENTY-SECOND ASSIGNMENT OF ERROR

This assignment complains of the action of the Court in permitting the line of argument pursued by the District Attorney in his closing argument to the jury. (R. p 68). The bill of exceptions (R. p 59 and 60), shows the following: In his closing argument to the jury the District Attorney stated and argued as follows: "That the defendant, by his counsel, was saving exceptions to the action of the Court and availing himself of every technicality in the hope of securing a reversal of the case in the Supreme Court; that they placed their reliance there, and not upon an acquittal upon the merits, and were attempting to make a record to reverse the judgment of this Court in the Supreme Court."

The defendant objected to such argument as being improper and calculated to mislead the jury and prejudice their minds against him, and requested the Court not to allow such line of argument to proceed; but the Court refused such request and the defendant excepted.

It is clear that a defendant should not be convicted of murder, because his counsel avail themselves of rights which they believe

the law has guaranteed him. It is equally clear, that it is illegitimate argument to contend that such conduct on the part of counsel is tantamount to an admission of, or should lead to, inference of guilt on the part of the defendant. If so, the Court should have unquestionably sustained the objection. Instead of doing so, however, the Court placed the stamp of its approval upon the illegitimate inference which counsel for the Government was seeking to draw. This action of the Court gave an added weight in the minds of the jury to the inference the Government was seeking to draw.

TWENTY-SECOND ASSIGNMENT OF ERROR

This assignment complains of the first paragraph of the instructions given the jury by the Court at the request of the Government, and which is as follows: "The Court instructs the jury, if they believe from the evidence beyond a reasonable doubt, that the defendant Homer Bird, on the 27th day of Sept., 1898, at a point on the Yukon river, about two miles below the coal mine known as Camp Dewey and about 85 miles above Anvik and within the District of Alaska, shot and killed one J. H. Hurlin and that said killing was malicious, premeditated and wilful and that said killing was not in the necessary defense of the defendant's life or to prevent the infliction upon him of great bodily harm, then it is your duty to find the defendant guilty as charged in the indictment."

The bill of exceptions (R. p 60), shows that when the above quoted instruction was given, the defendant excepted to it, because not qualified by the further charge that if the defendant believed and had reason to believe, that the killing was necessary

for the defense of his life, and (or) to prevent the infliction upon him of great bodily harm, then he was not guilty.

That the charge given should have been qualified as requested in the exception, is elementary in the law of self defense.

TWENTY-FOURTH ASSIGNMENT OF ERROR.

This assignment complains of the following instructions given to the jury by the Court at the request of the Government: "That as in this case, where it is claimed by defendant that up to the time of the killing of the deceased there had been no previous quarrel or difficulty, but that the relations had been friendly and amicable, but that in the discussion between defendant, deceased, and one Patterson, of a business matter, a quarrel suddenly sprung up between Patterson and defendant, and defendant struck Patterson in the face after first having been hit by Patterson in the side; that thereupon Patterson started to run away and deceased started in another direction; but that neither Patterson or deceased were armed, and that defendant seized a shotgun and killed deceased, and that at the time of so doing, defendant's life was not in imminent danger or his person in danger of great bodily harm, and that he had no good reason to believe that such was the case, then the defendant is guilty of murder."

The bill of exceptions [R. p 60], shows that when the above quoted instruction was given, it was excepted to by the defendant, for the various errors contained in it which we will now briefly discuss. Under the other instructions given, and the testimony of the witnesses for the prosecution, if the jury believed said witnesses, the defendant was of course guilty of murder. But in the instruction above quoted, which the learned trial judge gave at the request of the Government, the Government abandoned its own

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case, as made by its witnesses, and takes up a case which the Court tells the jury is the state of facts claimed by the defendant. In so doing, it grossly misstates the dejendant's case; it assumes as an established fact in the case, wholly without any support in the evidence, [for the defendant's testimony was the only testimony in his behalf as to the facts and circumstances surrounding the killing, [R. p 54] that defendant claimed that Patterson started to runaway. There is no where in the record, any testimony that Patterson started to run away; but the testimony of the defendant was that he started to get his gun. There was no claim by defendant, that neither Patterson or deceased were armed, as assumed by the Court; but the defendant's testimony was, that Patterson was going for a gun and the deceased actualiy had a gun in his hand. There was no claim on the part of the defendant that his life was not in imminent danger or that he had no good reason to believe such was not the case; but his testimony was that he shot Hurlin, when he was in the act of making a murderous assault upon him with a gun; that he shot Patterson because he thought he was making for his gun. (See the testimony for defendant in full, Record, pp 52-54.) The Court not only tells the jury, that defendant claims a state of facts to exist which he did not claim to exist but he further tells the jury, that because defendant makes this claim, he is guilty of murder. The charge in other words does not leave the facts to be found by the jury, but tells the jury WHAT THE DEFENDANT CLAIMS, and "that where, as in this case" such claim is made, the defendant is GUILTY OF MURDER. The instruction was tantamount to a peremptory instruction to find the defendant guilty. In other words defendant was placed in this position: If the jury believed the witnesses for the prosecution, under the instructions of the Court they must find the defendant guilty. If the jury did not believe the witnesses for the prosecution then under the charge complained of, they were bound to find him guilty anyway. In other words with the charge complained of before the jury, the many pages of instructions given, were reduced to this: If you believe the witnesses for the prosecution find the defendant guilty. If you do

not believe the witness for the prosecution, find the defendant guilty anyway. because of what HE CLAIMS to be the facts; which CLAIMS were not left to the jury to find, but were assumed by the Court (2 Thomp. on Trials, Sec. 2295, and authorities there collected.)

TWENTY-FOURTH ASSIGNMENT OF ERROR(A)

This assignment complains of the refusal of the Court to send out with the jury, in their retirement to consider the case, the written instructions read to the jury by the Court. [R. p 69.] The bill of exceptions [R. p 61], shows that all the instructions given by the Court to the jury, either at the request of the parties or of his own motion, were first reduced to writing, and read to the jury, but said instructions were not delivered to the jury to be taken with them into their retirement to consider their verdict, and were not before the jury while they were deliberating upon their verdict, but were immediately after being read to the jury by the Court, filed with the clerk and remained in his custody in his office; to which the defendant then and there excepted.

Section 136, of the Code of Criminal Procedure for Alaska, adopted by Congress March 3rd, 1899, provides among other things as follows: "All written charges and instructions shall be taken by the jury in their retirement and returned with their verdict into Court and shall remain on file with the papers in the case." [Carter's Anotated Alaska Code, p 68.]

This plain provision of the law the Court deliberately violated. This provision of the Code of Alaska, is the re-enactment of Section 7300 of the Code of Ohio and of course when enacted by

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Congress for Alaska, in March 1899, it was enacted with the same construction that it had received in the State of Ohio. In discussing the proper construction of this Statute the Supreme Court of Ohio says: "The purpose of this Statute was to secure a carefully considered charge from the Court, free from misleading words, which are sometimes found in unwritten charges, and to have it in such form, that the jury can reach it in their retirement in case they have misapprehended, during its reading by the Court." (Householder vs. Grenby, (40 Ohio St Rep., p 430). This was in a civil case which was reversed for the failure of the Court to comply with this Statute. How much more then is it a reversable error in a capital case? (See also Hopt. vs. People, 114 U. S. p 488, holding mandatory a somewhat similar provision of the Utah Statute.)

We have only presented in this brief the assignments of error that seem most material. In conclusion we submit that the cause must be reversed, 1st. For the errors of the Court in empaneling the jury. 2nd. For the errors of the Court in admitting improper and incompetent testimony. 3rd. For the error of the Court in permitting the argument of the District Attorney complained of. 4th. For errors in instructions to the jury. 5th. For a refusal of the Court to send the written instructions with the jury in their retirement to consider on their verdict. Respectfully submitted,

W. W. DUDLEY & MICHENER and MALONY & COBB,
Counsel for Homer Bird, the Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

HOMER BIRD, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 278.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.

BRIEF FOR THE UNITED STATES.

The defendant, Homer Bird, was charged with and convicted of the crime of murder. It appeared from the evidence that the defendant originally came from the city of New Orleans, where, in March, 1898, he joined with Charles Sheffler, R. L. Patterson, and the deceased, J. H. Hurlin, in a prospecting tour for gold in the Territory of Alaska. The four men each agreed to furnish $500, but Sheffler failed to put up his quota, and Bird furnished $1,000, and the remainder of it was contributed by Hurlin and Patterson. The party started from San Francisco, at which point they were joined by a woman by the name of Naomi Strong, who seems to have been Bird's mistress. The party had equipped itself with a small steam launch and a scow with provisions. They sailed from San Francisco May 21, 1898; reached St. Michaels in July, and

about a week later started up the Yukon River. In September, when they were at a point on the Yukon River, they determined to go into winter quarters. It is apparent from the testimony that during the progress of the journey serious difficulties had arisen between the partners, which were partly due to differences of opinion as to the respective shares of the partners in the joint enterprise and to the quarrelsome disposition of the defendant. As a result of these differences Sheffler, Patterson, and Hurlin determined to leave Bird and the woman, but, at Bird's request, agreed to remain until a cabin, which they were constructing for winter quarters, could be finished. On the morning of September 27, 1898, the defendant had arisen early and returned for breakfast. Sheffler, Hurlin, and Patterson sat down on a seat facing the stern of the boat. Bird was seated on his bed immediately in the rear of Hurlin and about 6 feet away. Naomi Strong asked Bird to come down and take some breakfast. He replied that he would take his breakfast where he was. What followed is best described by Naomi Strong, who saw the whole occurrence:

> "We didn't have room for a table; they were eating it in their laps in little tin plates. So I heard Mr. Bird's gun click, like one was going to break it open or close it, and when I heard Mr. Bird's gun I looked up and I saw him raise up. I didn't see the gun, and I didn't like the look on his face, but I didn't pay any attention until I heard the gun, and I looked up and saw Mr. Bird standing there with his gun in his

hand closing it, and I looked at him, and Mr. Scheffler saw me looking and he turned round, and then Bird he said, "Now you Dutch ———, I have got you," and he shot Hurlin—shot him back of the left ear—and Mr. Scheffler jumped up and said, "For God's sake, don't shoot me," and he was facing Homer, the defendant, and Mr. Patterson jumped behind me, and I jumped and ran, and as I passed the defendant he fired at Mr. Patterson, and then Mr. Patterson jumped overboard, and I climbed out on the beach, and Mr. Patterson, after he jumped overboard, walked around on the right side of the boat, and Mr. Bird ran and headed him off at the bow of the boat, and Mr. Patterson was begging for the defendant not to shoot him. He said, "Homer [Bird], for God's sake don't shoot me any more." And Homer said, "Don't you come up to me or I will shoot you." He was walking, begging for Homer not to shoot him, and all at once Bird said, "Bob, you dirty ———, you are the cause of all this," and he shot at him again and missed him, and in the meantime he put the gun down in the bow of the boat, and Mr. Patterson crawled on the bank and sat down, and I was on the beach crying, and Mr. Patterson saw me and said, "Naomi, have mercy on me." And then Mr. Patterson held out his hand to Mr. Bird, and when Mr. Patterson held out his hand to Mr. Bird, Mr. Bird told me to take hold of Bob, and I went up to Mr. Patterson and took his hand and I said, "Where is Hurlin?" And he, defendant, said, "He is dead."

It also developed that after the shooting Patterson, in fear of his life, professed friendship for Bird, and asked him to spare his life, and Bird relented so far as he was concerned. Bird then compelled the woman to assist him in burying Hurlin.

The murder was, therefore, an inexcusable atrocity, and unless the defendant has been unfairly convicted his sentence should stand.

In support of his appeal the appellant has filed twenty-five assignments of error. Many of these, however, raise the same question, and some of them have apparently been abandoned. In his brief the appellant sets forth in a condensed form the alleged errors upon which he relies. He says:

> "The errors that will be relied upon relate to the action of the court in impaneling the jury; sustaining improper challenges for cause made by the Government; in admitting improper evidence in behalf of the plaintiffs; improper argument of the district attorney permitted by the court over the defendant's objection; errors in instructions given to the jury, and the failure of the court to send out with the jury on their retirement the written instructions given."

In replying to this brief I will follow this classification, and will assume that any errors not included within it are abandoned, and will not, therefore, discuss them.

I.

THE ILLEGALITY OF THE JURY.

It appears from the bill of exceptions (Transcript, p. 75) that the list of petit jurors, numbering 75, which had been legally drawn, was duly served upon the defendant as "the panel of jurors from which the trial jurors for the trial of this cause would be drawn." It further appears that on November 10, 1899 (folio 3), the defendant was arraigned, "whereupon copies of the indictment, a list of the witnesses to be called by the plaintiff upon the trial, and a list of the petit jury for this term were served upon defendant in open court by the United States attorney." On November 13, 1899, the defendant pleaded not guilty to the indictment, and on December 1, 1899, the following proceedings took place as set forth in the record (folio 16):

> "This cause coming on for trial, the clerk proceeded to call the venire of the petit jury under the direction of the court, and the regular panel of the petit jury being exhausted because of the challenges exercised by the parties, the court made the following order, to wit:
>
> It appearing to the court that there is not present a petit jury sufficient to complete the jury in this cause, the United States marshal or his deputy is hereby ordered and directed to summon from the bystanders a sufficient number of citizens of the Territory and of the United States, having the qualifications of jurors, to complete the jury.

> In pursuance of the foregoing order, the United States marshal summoned and returned the following-named persons, to wit: H. W. Price, J. W. Price, John Reck, E. D. Rasmussen."

Thereupon the jury was sworn. Thus far the record discloses no objection by the defendant or exception by him to the manner of selecting the jury. It appears, however, from the bill of exceptions (folio 76), as follows:

> "Afterwards, on the 1st day of December, 1899, when the defendant was put upon trial, it appeared that of said 75 persons whose names appeared upon the said list served upon the defendant there remained only 43 of said names in the box from which said jury was being drawn. It further appeared that 24 jurors on said list of jurors served upon defendant had been excused by the court prior to the calling of this cause for trial, and of the remaining 8 persons missing from said list whose names were not in the box 1 was sick and the remaining 7 had not been served by the marshal. Defendant thereupon objected to further proceeding with the trial of said cause at said time, and the further selecting and drawing of said jury from said box, because he had not been served with a correct list of the names in such jury box, and because 24 jurors whose names appeared upon the list served upon the defendant had been excused without the consent of the defendant, and the defendant was thereby denied his legal right to be tried by a jury selected from the panel served upon him; but the court overruled

> said objection and ordered the trial to proceed, to which ruling of the court defendant then and there duly excepted."

It further appears that when the panel was exhausted and the talesmen were summoned the objection was renewed, and when overruled an exception was duly taken.

The objection thus urged seems to be a twofold one—first, that jurors who are summoned, and whose names appear upon the list which is served upon the defendant, can not be excused by the court without his consent; and, secondly, that the jury can not be completed, when the panel is exhausted, by summoning talesmen. The appellant in his brief, however, abandons the second ground for the objection, for he says:

> "We do not question the propriety of completing a jury by summoning bystanders when the regular panel has been legally exhausted. But the point is, that the court arbitrarily excused a large part of the regular panel, thus creating a necessity for the summoning of bystanders, which would not otherwise have arisen."

The right, therefore, of the court to excuse jurors after a list has been served upon the defendant is called into question. I may suggest at the outset that the record fails to disclose that "the court arbitrarily excused a large part of the regular panel," or even that the excusing of such jurors was without the implied consent of the defendant. All that the record says is that "twenty-four jurors had been excused by the court prior to the calling of this cause for trial." But

whether these jurors were excused in open court when the defendant was present therein, or whether the defendant, before his case was called for trial, had knowledge that such jurors were excused, does not appear from the record. It is to be presumed that these jurors were excused, as jurors are ordinarily excused, by application in open court and appropriate minute thereof, to which the defendant could have access. In every panel of jurors there are always some who have been drawn who either can not be summoned, or, if summoned, can not attend. Death, sickness, advanced age, absence, and many other causes make this inevitable. Every practicing attorney therefore knows that it is extremely probable, if not certain, that some of the panel as drawn will either not be summoned or will not attend, and he knows moreover that he can learn before he enters upon the trial of the case which of the jurors have been excused. It is fair to presume that the defendant, through his counsel, knew that which he might have known on proper inquiry, and it thus appears that although he was served with a correct list of the jurors on November 9, he made no objection to the commencement of the trial, so far as the regularity of the jury was concerned, until the case had actually commenced and the jury had been partially drawn.

There is, however, no merit in the objection. Section 1033 of the Revised Statutes provides that in any capital offense other than treason a "copy of the indictment and list of the jurors and witnesses shall be

delivered to him at least two entire days before the trial." Assuming that this act of Congress has application to the Territorial court for the district of Alaska, it can not bear the construction which appellant places upon it. Its obvious meaning is that the list of the petit jurors *as drawn* shall be furnished the defendant. It can not mean that the list of the petit jurors who are able to serve at the time the trial is commenced shall be served upon the defendant, for that would often be impossible. The list must be served at least two entire days before the trial, and it is always possible that in those two days a juror may die or be otherwise incapacitated to serve. The only list, therefore, which the defendant has a right to ask under the statute is a list of the entire panel, and as its only purpose is to give him the right to inquire before the trial as to any juror who by any possibility may be called to try his case, that object is as effectually accomplished when he receives the entire panel as if he should be given a list of those only, who have been summoned as well as drawn, and who have not been excused. It is suggested, however, that in some way the identity of the list is affected by the action of the judge in excusing a number of the jurors. I can not believe that there can be any serious question as to this. The right of the court to excuse jurors has been exercised time out of mind and must exist. No authority can be quoted to show that the court must consult every defendant in every criminal case pending in his court before excusing a juror. That also would be almost an impossibility.

The only question, therefore, is whether the excusing of a considerable portion of the jury destroys the identity of the list which has been furnished the defendant. No authority is cited to support this position. The defendant has a list of the jurors who are not excused and who may try his case. This is all that he can ask. It may be that if the court excused so many jurors that less than twelve remained, the purpose of the section already cited would be defeated. But in this case forty-three jurors remained, who were upon the panel, and the exhaustion of this number was due to the exercise of the right of challenge; and this, as defendant admits, justified the summoning of the talesmen.

Independent of this fact, section 1033 of the Revised Statutes has no application to Territorial governments. (*Thiede* v. *Utah Territory*, 159 U. S., 510, 514, 515; *Miles* v *United States*, 103 U. S., 304; *Page* v. *Burnsteine*, 102 U. S., 664, 668; *Reynolds* v. *United States*, 98 U. S., 145; *Good* v. *Martin*, 95 U. S., 90; *Hornbuckle* v. *Toombs*, 18 Wall., 648; *Clinton* v. *Englebrecht*, 13 Wall., 434.) No section of the Territorial laws of Alaska has been cited by appellant which makes it necessary to furnish a list of the jurors, and the right did not exist at common law.

II.

COMPETENCY OF JURORS.

This forms the subject of the fourth, sixth, seventh, and eighth assignments of error. The fourth assignment of error refers to the action of the court in sus-

taining the challenge of the Government to the juror E. R. Jaeger. It appears from the record (folios 78 and 79) that Jaeger, being examined on his voir dire, testified in substance that the fact that the defendant had a family and brought his wife and child into court would tend to influence his verdict. When asked as to what he meant by this, he said as follows:

> Q. (By the COURT.) It would take stronger evidence for you to bring in a verdict of guilty than if he were a single man?
>
> A. If he was a single man without a family.
>
> Q. (By the COURT.) Yes; but with a wife and child it would take stronger testimony if he did have a wife and child than it would if it was shown that he had no wife and child?
>
> A. Yes; I think it would; that is, it would take stronger testimony for me to render the same verdict.

The court thereupon sustained the Government's challenge. Counsel for appellant is of opinion that this is clearly erroneous and says that "a juryman who knows so little of human nature that he would require no stronger evidence to convict a man in the one case than he would in the other would be unfit to pass upon the life of a fellow man." This necessarily means that there is one measure of proof in criminal cases for married men and another for single men, and the proposition is so entirely without either principle or authority to support it that any argument seems superfluous. It may be proper to show by evidence what manner of man the defendant is, whether married or single, rich or poor, learned or ignorant, and these

facts often throw light upon a particular transaction. The defendant was not denied this right. The court simply ruled that when a proposed juror, before he has heard any evidence, lays down the arbitrary rule that he would require more evidence to convict a married man than a single man of a given crime, he showed his own incompetency, for the law gives no sanction to any such presumption. It is well known that defendants often shield themselves behind the very natural sympathy which jurors feel for the innocent wife and children of such defendant, and the court discharged its duty by guarding against this unfair appeal to sympathy.

The sixth, seventh, and eighth assignments of error relate to the other jurors, to whom the objection is made that they were excused. It appears that they had acted as jurors within one year of the term of court at which the defendant was tried, although five of them had not been drawn on the regular panel, but had been summoned as talesmen. They were nevertheless jurors, duly called in accordance with law and sworn as such, and the act of June 30, 1879 (21 Stat., 43), provides that "no person shall serve as a petit juror more than one term in any one year." The court, having considered this fact, thought it better to excuse the jurors. This was clearly within his discretion. The jurors could have been excused by the court of its own motion before the trial commenced, and the defendant would not have been prejudiced.

Moreover, the improper *exclusion* of a juror is not,

by the weight of authority, a ground of exception. (1 Thompson on Trials, sections 43, 118, 120.) The main reason assigned for this rule is that the prisoner has no just cause of complaint if he is tried by twelve qualified and impartial men. "A competent and unbiased juror was selected, sworn," and he "had, therefore, a trial by an impartial jury, which was all" he "could demand." (*Northern Pacific R. R. Co.* v. *Herbert*, 116 U. S., 642, 646; *Southern Pacific Company* v. *Raub*, 7 U. S. App., 84, 94.) His own right of peremptory challenge is "not of itself a right to select, but a right to reject jurors." (*Pointer* v. *United States*, 151 U. S., 399, 412.) He can not complain of an erroneous overruling of his own challenge for cause, provided he could have remedied the error by a peremptory challenge. (*Spies* v. *Illinois*, 123 U. S., 131; *Hopt* v. *Utah*, 120 U. S., 430.) The decisions in the State of New York are to the contrary, but two judges dissent in the leading case of *People* v. *McQuade* (110 N. Y., 284), and the ruling of this court is in line with the general weight of authority. (Cases cited in note to the McQuade case, 21 Abbott, N. C., 458.) "But in truth and according to law there is no necessity nor right that a prisoner shall be tried by particular jurymen, till the prisoner has been given in charge to the jury." (Lord Campbell, C. J., in *Mansell* v. *The Queen*, 8 El. & Bl., 54, 79.) The trial judge may exclude of his own motion, and no exception lies if an impartial jury is obtained. (*United States* v. *Jones*, 69 Fed. Rep., 973, 975, 976, and cases cited.)

Another reason for the rule is given in *People* v. *Murphy* (45 Cal., 137, 142), namely, that error in excluding a proper juror can not be repaired upon a second trial.

III.

ADMISSION OF EVIDENCE.

The tenth assignment of error refers to the testimony of one Charles Sheffler, a witness in behalf of the Government, who was offered to show the motive on the part of the defendant to kill the man of whose murder he was charged. It does not appear from the bill of exceptions whether any objection was made at the time the questions were asked which elicited the testimony. (See folios 99 and 100.) Apparently the testimony was given by the witness without objection at the time the questions were asked, and afterwards counsel for defendant made such objection. Subsequently, however (folio 101), counsel for the Government asked the following question: "State generally what was the bearing and conduct of this defendant toward the party from the time you left St. Michaels until the time you went into winter quarters," and this question was permitted. It is difficult to understand upon what ground the objection could have been sustained. The testimony threw a strong light not only upon the motive which prompted the defendant to kill Hurlin, but also upon the vital question whether the defendant shot in self-defense or shot Hurlin without any adequate provocation. In order to determine these facts it was necessary to show the relations between this party of five

people who were making a joint expedition up the Yukon River, the nature of their expedition, their attitude toward each other, their quarrels, if any, or rather their differences of opinion. During the whole progress of the journey the parties seem to have disagreed about their interests in the joint enterprise, and about September 24 they determined to separate, Hurlin, Patterson, and Sheffler going one way, and the defendant and Naomi Strong, going another. According to the testimony of the prosecution, on the 27th, while the party was at breakfast, the defendant suddenly, and without warning, took a shotgun, killed Hurlin, and shot and seriously wounded Patterson, and it was therefore necessary for the prosecution to prove that this killing was malicious and that no adequate excuse existed for it. The defendant denied that there had been these disagreements and heated quarreling between the parties on the journey up the Yukon and testified that there had been no serious disagreement until within a few days of the murder. It was therefore necessary to show whether this statement was true or not, and, incidentally, to show a growing hatred during the progress of the journey on the part of the defendant against the two men, one of whom he murdered and the other of whom he seriously wounded. Given this quarrel and these differences of opinion with regard to the division of the common property and a motive was disclosed for the murder, and the fact of such murder became more reasonable. If, however, they were, as defendant claimed, on friendly terms until within a few days of the murder, the prob-

ability of the Government's version became materially lessened. In such cases, where motive and malice are in issue, a reasonable latitude must be allowed in the proof of circumstances which seek to show either. A grudge may be cherished for a long while and a cause for a quarrel may have its origin months before the actual explosion. As was said by Mr. Justice Brown in the recent case of *Fitzpatrick* v. *United States* (178 U. S., 313):

> "There was no doubt that a homicide had been committed, and it was the province of the jury to determine whether the defendant was a guilty party. Any fact which had a bearing upon this question, immediate or remote, and occurring at any time before the incident was closed, was proper for the consideration of the jury. * * * In the trial of either party it is proper to lay before the jury the entire affair, including the acts and conduct of all the defendants from the time the homicide was first contemplated to the time the transaction was closed."

The thirteenth assignment of error refers to the explanation of the witness Charles Sheffler as to why he did not tell of the condition of affairs at the cabin on the evening after the killing of Hurlin and the shooting of Patterson. The bill of exceptions does not show how this testimony arose and whether the preliminary question was objected to. Presumably Sheffler, on the day following the murder, had failed to disclose to someone the circumstances of the killing, and, ordinarily, this fact would weigh against his testimony as

to the fact of such killing. Under ordinary circumstances a man who has seen A kill B will disclose the fact at the earliest possible moment. To rebut, therefore, any suggestion of bad faith or untruthfulness, it was necessary to show special reason for Sheffler's silence, and his answer did this. He was 600 miles up the Yukon River and in a wilderness. He had seen the defendant, without any warning or provocation, kill one man and attempt to kill another. The woman was the mistress of the defendant. He naturally supposed that any attempt on his part to disclose the facts of the matter would lead defendant in his desperation to commit another murder. Such fact was proper for the jury, and the inference was for them. For the same purpose Sheffler was permitted to testify, for the purpose of explaining his failure to disclose the fact of the murder, that after it took place he told Patterson that he was going to get help, and Patterson said "That man will finish killing me," and thereupon the witness "promised to stick by him." All of this was competent as bearing upon the good faith of the witness. Unless he could adequately explain why he did not promptly disclose the fact of the murder, his testimony would have little weight. His explanation was entirely reasonable. As long as he remained in camp the defendant would not dare to kill Patterson with the witness present, but if the witness started to the nearest settlement, the defendant, who might close the mouth of his mistress, might well have made away with the man whom he had once tried to kill and who would be

an important witness in testifying to the circumstances under which defendant killed Hurlin.

The fourteenth assignment of error refers to some testimony as to a quarrel between the defendant and his mistress, Naomi Strong. It is impossible to tell from the record the purpose for which this testimony was offered, or its connection with the case. The bill of exceptions also fails to disclose whether the objection came after the testimony was given, or was an objection to a preliminary offer. I respectfully submit that counsel should not expect this court to pass upon such questions without bringing up in the bill of exceptions sufficient testimony to show in what connection the testimony was given and in what way the question arises, and whether the objection was made seasonably, or after the testimony had been given without preliminary objection. So far as the present incomplete record goes, it is difficult to imagine what possible harm the testimony in question did the defendant, and this court will not invalidate a verdict unless it is reasonably clear that the defendant has been prejudiced.

IV.

The twentieth assignment of error refers to the refusal of the court to permit an experiment to be made outside of the court room as to the effect of firing a shotgun at a given distance. Patterson had stated that when the defendant had fired at him he was not more than 6 feet distant. The defendant claimed that he was 30 feet away from Patterson when he shot

him. It must be remembered that the defendant was not indicted for killing Patterson, but for killing Hurlin. After the defendant killed Hurlin, Patterson jumped off the boat and was fired upon in the water. The fact that Patterson was shot at was competent to show the wicked malice of the defendant, and it also threw light upon the fact that the cause for the shooting was the difference between the partners as to the division of the property; but whether Patterson was 6 feet or 30 feet away from the defendant was not important. At all events, the right to make an experiment outside of the court room is a matter that may be left safely to the discretion of the trial judge, and with an incomplete record before it this court should, I submit, decline to interfere with the exercise of such discretion.

The twenty-second assignment of error relates to an argument of the district attorney to the jury. It surely can not be error for the district attorney to state that which was a fact, and of which this record, incomplete as it is, gives abundant evidence, that the defendant "was saving exceptions to the action of the court and availing himself of every technicality in the hope of securing a reversal of the case in the Supreme Court." The jury saw this for themselves. If this were not the purpose of taking the exceptions, it is difficult to understand why the exceptions were taken. The jury could fairly presume that the defendant in this case, as in every case, has his right to that which he thinks to be error and his right to have the case reviewed in a

higher court. Nor was it a legal error to state that which is also a fact, that the defendant's counsel, in the discharge of their duty, "were attempting to make a record to reverse the judgment of this court in the Supreme Court." If this were not the purpose of the exceptions, what was their purpose? It can not be error to tell a jury that the defendant is exercising his rights. The only question there can be, therefore, is as to whether the district attorney should have argued that defendant's counsel "placed their reliance" upon the possible action of an appellate court. For aught that appears, this may have been the fact. The guilt of a defendant may be so clearly demonstrated by the evidence that the defendant is hopeless as to the verdict of a jury, but it is relying upon some technical flaw in the trial of the case. Whether this were true of the present case it is impossible to determine from the incomplete record. It is sufficient to say that this statement of the district attorney is not reversible error. There is nothing to show that he persisted in this line of argument after objection was made to it. But even if he had, some latitude must be allowed to counsel in the argument of a case. Counsel for defendant are left free to exercise the finesse of advocacy in seeking to convince juries of the innocence of their clients in the teeth of the testimony. In so doing they frequently comment upon the confidence or want of confidence of the Government in its case, and the rules of advocacy can not be so limited that they may not do so. The same right must be accorded to the district attorney. It is

better to have a full discussion of the matter, even though some arguments employed by counsel are fallacious, than to attempt by arbitrary rules to limit such methods of reasoning. There are, of course, positive prohibitions in argument which must be observed. The district attorney may not comment upon the failure of the defendant to take the stand; but this is so because of positive enactment. But with this and other well-recognized exceptions the confidence of counsel, real or assumed, in the strength of their own case or the weakness of their adversary's must not be taken too seriously.

V.

INSTRUCTIONS OF THE COURT.

No complaint is made as to the portion of the judge's charge which is the subject of the twenty-third assignment of error, except that it does not go far enough and state a possible qualification. Here again the incomplete and unsatisfactory bill of exceptions prevents this court from knowing whether the charge as a whole did not adequately present the defendant's theory of the case. It may well be that the qualification, or rather additional instruction, which defendant's counsel sought to add to the portion of the charge already quoted was the subject of separate instructions. Where the complaint is not with what was said, but with what the court failed to say, and only a few sentences of the judge's charge are quoted, it would be obviously unfair to reverse on that account, for the instruction prayed

for may well have been in the portions of the charge not quoted. It is quite obvious, from an inspection of this record, that the two theories of the case were presented to the jury—the one, that the defendant, maliciously and without adequate cause, killed the deceased, and the other, developed by his own testimony, that the killing was in self-defense. See defendant's testimony, folio pages 96, 97, 98, 99. It is inconceivable that the court in its instructions did not charge with reference to the defendant's theory, and I submit that it will not be reversed on an isolated fragment of the charge.

The same is true of the twenty-fourth assignment of error, which is torn out of its proper context. If the portion of the charge is correctly transcribed, it is obvious that the court meant to charge that if certain facts were found by the jury to be as stated the defendant was guilty of murder.

I again suggest that which is stated in connection with the preceding assignment of error, that it would be both unsafe and unfair to the trial judge to reverse on account of an isolated sentence from the charge torn from its context where the whole charge is not set forth.

VI.

The twenty-fifth assignment of error complains of the refusal of the court to send out with the jury, when they retired to consider the case, the written instructions which were read to the jury by the court.

It does not appear from the bill of exceptions that

counsel for the defendant made any request that the court should send out to the jury his written instructions. All that is said is, after the court had failed to send out the written instructions and had filed them with the clerk, "the defendant then and there excepted."

It further appears by the bill of exceptions (p. 112) that the written instructions were "filed with the clerk and remained in his custody and in his office." It thus appears that these written instructions were in the possession of the legal custodian of the records of the court, and were accessible to the jury if the jury needed them. There is no reason to believe, therefore, that the defendant suffered any prejudice by the fact that the jury did not have actual physical possession of the written instructions.

It was not necessary at common law either to reduce the charge to writing or to send it to the jury, and the only statutory requirement that such course be taken is found in the act of March 3, 1899, providing a code of criminal procedure for Alaska. Did this code apply to the trial of this case? While it was enacted before the trial, it became a law after the commission of the offense, and the offense being a felony the code can not be held to apply to the trial of this offense without becoming an ex post facto law. (*Thompson* v. *Utah*, 170 U. S., 343, 346, 350, 351.) This was the view which the court below took of the matter, for, while under the Oregon code, which prevailed prior to the act of March 3, 1899, the Government was entitled to only five peremptory challenges,

under the latter law it was entitled to ten challenges, and the court restricted the Government to five challenges. In any event there is no reason to believe that the error prejudiced the defendant.

The other assignments of error need not be dwelt upon. There is no reason to believe that as to any of them the defendant suffered any prejudice.

As has been shown at the beginning of this brief, this murder was heartless and cowardly in the extreme, and unless errors have been committed to the substantial prejudice of the defendant the sentence imposed upon him should be carried out.

Respectfully submitted.

JAMES M. BECK,
Assistant Attorney-General.

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Supreme Court of the United States.

No. 278.—October Term, 1900.

Homer Bird, Plaintiff in Error, vs. The United States. } In error to the District Court of the United States for the District of Alaska.

[February 25, 1901.]

At a term of the United States District Court in and for the District of Alaska, Homer Bird, the plaintiff in error, was tried on a charge of having murdered one J. H. Hurlin on the 27th day of September, A. D. 1898. On December 6, 1899, the jury found the defendant guilty as charged in the indictment, and on December 13, 1899, a motion for a new trial having been overruled, a sentence of death by hanging on February 9, A. D. 1900, was pronounced. A bill of exceptions was settled and signed by the trial judge on February 8, 1900, and a writ of error from the Supreme Court of the United States was allowed. The evidence contained in the bill of exceptions shows that a party of five persons, composed of Homer Bird, J. H. Hurlin, Robert L. Patterson, Charles Scheffler, and Naomi Strong, sailed up the Yukon River, in the latter part of July, 1898, on an adventure in search of gold. They traveled on a small steam launch, towing a scow laden with an outfit of clothes and provisions sufficient to last them about two years. In the latter part of September, 1898, they reached a point on the river about 600 miles from St. Michaels, at the mouth of the Yukon, when they determined to go into winter quarters, and there began the construction of a cabin on the banks of the stream. On September 27, 1898, in a quarrel that had arisen about a partition of the supplies, Hurlin was shot and killed by Bird. At the trial in December, 1899, there were three witnesses who had been present at the time of the homicide, Scheffler, Strong and Bird, the accused. As the fact of the killing of Hurlin by Bird was not denied, the trial turned on the question whether the killing was malicious and wilful or was in self-defense.

Mr. Justice Shiras delivered the opinion of the Court.

The assignments of error are twenty-five in number, but of these we think it sufficient to consider only the tenth, the fourteenth and twenty-third.

The homicide, as alleged in the indictment, occurred on September 27, 1898, at a point on the Yukon River about eighty-five miles above Anvik, and about two miles below a coal mine known as Fort Dewey.

At the trial the government called as a witness for the prosecution one Charles Scheffler, who testified, among other things—

"That in the month of August, when the defendant, in company with the deceased, Hurlin, R. J. Patterson, Naomi Strong and witness, were going up the Yukon River in a steam launch, towing a barge loaded with their provisions, Hurlin was steering; that the defendant was very disagreeable to all the other persons; that when they would run into a sand bar, he would curse them; he would say 'the Dutch sons of bitches don't know where to run it.' On one occasion they were getting wood on the bank of the river, and Bird got out and wanted to hit Patterson. Witness didn't remember exactly what was said, but defendant called Patterson a "son of a bitch,' and told him he would 'hammer the devil out of him,' and witness and the others would not let them fight. And if anything would go wrong he, defendant, would not curse in front of witness and the others' faces, but defendant would be disagreeable all the way along, and would make things very disagreeable."

To this testimony the defendant, by his counsel, objected "as immaterial and irrelevant, and too remote from the time the offense is charged to have been committed;" but this objection was by the court overruled, and said testimony permitted to go to the jury; to which ruling of the court then and there excepted. This testimony, the objection and the ruling are set forth in the bill of exceptions, and form the subject of the tenth assignment of error.

As it was not denied that Hurlin died immediately from a wound intentionally inflicted by the accused, the issue to be determined by the jury was whether the accused was actuated by a malicious motive or acted in self-defense.

As the testimony in this issue was conflicting, or, rather, the defendant's evidence not yet having been given, as it might well have been anticipated that the testimony would be conflicting, it seems to have been the theory of the prosecution that the evidence in question in the tenth assignment tended to show such a state of enmity on the part of the accused towards the deceased as to warrant the jury in finding that the act of the accused in shooting the deceased was the result of a pre-existing unfriendly feeling.

The general rule on the subject of permitting testimony to be given of matters not alleged is that nothing shall be given in evidence which does not directly tend to the proof or disproof of the matter in issue. And it was said by Mr. Best in the ninety-second section of "Principles of Evidence," that whether a given fact, bearing indirectly on a matter in issue, should be received as circumstantial, or rejected as conjectural evidence, is often a question of extreme difficulty.

In the proof of intention it is not always necessary that the evidence should apply directly to the particular act with the commission of which the party is charged; for the unlawful intent in the particular case may

well be inferred from a similar intent, proved to have existed in other transactions done before or after that time. Thus, upon the trial of a person for maliciously shooting another, the question being whether it was done by accident or design, evidence was admitted to prove that the prisoner intentionally shot at the prosecutor at another time, about a quarter of an hour distant from the shooting charged in the indictment.

So, also, in cases of homicide, evidence of former hostility and menaces on the part of the prisoner against the deceased are admissible in proof of malice. (3 Greenleaf, sec. 15, Redfield's edition.)

But in the case of *Farrer* v. *State*, (Ohio Rep. N. S. vol. 2, p. 54,) it was held, upon full consideration, that on an indictment charging the prisoner with poisoning A, in December, 1851, it is error to permit evidence in chief to show that she poisoned B in the month of Augnst previous.

So, in *Com.* v. *Horton*, (2 Gray, 354,) it was held by the Supreme Judicial Court of Massachusetts that, under an indictment charging one act of adultery at a particular time and place, evidence of other acts of a similar character at other times and places is inadmissible, the court saying:

"It is a universal rule, in the trial of criminal cases, that nothing shall be given in evidence which does not directly tend to the proof or the disproof of the matter in issue. The prosecuting officer is not, therefore, allowed to give evidence of facts tending to prove a similar, but distinct offense, for the purpose of raising an inference or presumption that the accused committed the particular act with which he is charged."

But even if it be conceded that prior conduct of the accused may be put in evidence in order to show that he had feelings of enmity towards the deceased, we are clear that the testimony was wrongfully admitted in the present case, because the time of the incident testified to, more than a month before the homicide, was too remote, and because the incident itself did not tend to prove any feeling of enmity on the part of Bird to the deceased, such as to warrant the jury in inferring that the subsequent homicide was malicious and premeditated. The particular violence threatened was not against the deceased, but against another member of the party; and the vulgar language attributed to the accused was of a character not unusual among coarse men engaged in such an adventure.

The only doubt we feel is whether the evidence, though improperly admitted, was of sufficient importance to call for a reversal of the judgment. However, we cannot say that the testimony did not suffice to turn the scale against the prisoner. And we are the more inclined to sustain this exception, because the error was immediately followed by another and similar one, appearing in the fourteenth assignment of error.

The bill of exceptions discloses that, over objection, Scheffler was permitted to testify as follows:

"That in the latter part of March, 1899, after Patterson had been carried to Anvik, Bird made a trip up the river and came back with a man named Smith; that Smith left, and the next day after that Bird was very disagreeable and tried to pick a fight with the woman Naomi Strong; he acted very funny. You had to watch him and be careful. He got awful good after that, and everything was just so. It was Charles this and Naomi that."

The matters so testified to took place six months after the alleged murder, and would seem to have no bearing, direct or remote, upon the guilt of the accused, but still may have tended to persuade the jury that Bird was a dangerous man and likely to kill any one who excited his anger.

We think there was substantial error in the first paragraph of the instructions given the jury by the court at the request of the government, and which was as follows:

"The court instructs the jury, if they believe from the evidence beyond a reasonable doubt that the defendant Homer Bird, on the 27th day of September, 1898, at a point on the Yukon River, about two miles below the coal mine known as Camp Dewey and about 85 miles above Anvik and within the District of Alaska, shot and killed one J. H. Hurlin, and that said killing was malicious, premeditated and wilful, and that said killing was not in the necessary defense of the defendant's life or to prevent the infliction upon him of great bodily harm, then it is your duty to find the defendant guilty as charged in the indictment."

The bill of exceptions shows that to "this instruction the defendant then and there excepted for the reason that the same is erroneous because not qualified by the further charge that if the defendant believed, and had reason to believe, that the killing was necessary for the defense of his life or to prevent the infliction upon him of great bodily harm, then he was not guilty."

It is well settled that the defendant has a right to a full statement of the law from the court, and that a neglect to give such full statement, when the jury consequently fall into error, is sufficient reason for reversal. The numerous decisions to this effect are cited in Wharton on Criminal Law, vol. 3, sec. 3162, 7th ed. The chief object contemplated in the charge of the judge is to explain the law of the case, to point out the essentials to be proved on the one side and the other, and to bring into view the relations of the particular evidence adduced to the particular issues involved.

It has sometimes been said that if the judge omits something and is not asked to supply the defect, the party who remained voluntarily silent cannot complain. But such a principle cannot apply to the present case, because the judge's attention was directly called by the government's request to the question of self-defense, and because the defect in that request was then and there pointed out by the defendant's counsel in their exception. The question involved in that instruction was a fundamental

one in the case; indeed, it may be said that the defendant's sole defense rested upon it. The defendant, as shown in the bill of exceptions, had testified to his own belief that his life was in danger, and to the facts that led him so to believe; but by the instruction given the jury were left to pass upon the vital question without reference to the defendant's evidence. (*Beard* v. *United States*, 158 U. S. 554–559.)

As the trial judge allowed and signed a bill of exceptions to his instruction in this behalf, it cannot be fairly presumed that the error was healed by any modification or correction made in some other and undisclosed part of his charge.

The judgment of the District Court of the United States for the District of Alaska is reversed, and the cause is remanded to that court with directions to set aside the verdict and award a new trial.

True copy.

Test:

Clerk Supreme Court, U. S.